Ft. Peck
Marathon Motion to Transfer

1021a RC - MT, EAST POPLAR OIL FIELD
MARATHON OIL CO. MOTION TO TRANSFER
Folder ID: 75642 2002 Privileged

Release in Full

U.S. Department of Justice

Environment and Natural Resources Division

LJG:DAC

David A. Carson
Environmental Defense Section
999 18th Street
Suite 945 North Tower
Denver, CO 80202

Telephone (303) 312-7309
Facsimile (303) 312-7331

February 8, 2002

via federal express

Marcia M. Waldron, Clerk
21400 United States Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106-1790
Attn: Lynn Caswell Lopez

Re: Samson Hydrocarbons Co. v. EPA, Nos. 01-3672 & 01-4304 (3rd Cir.)(consolidated); Murphy Exploration and Production Co. v. EPA, No. 01-3936

Dear Ms. Lopez:

Enclosed please find two originals and six copies of EPA's Response to Statement of Interest of Non-Party Marathon Oil Company and Request by Marathon Oil Company to Delay Ruling on EPA's Motion to Transfer. There is one original and three copies of this document for each case. Copies have been served in accordance with the attached Certificates of Service.

Please do not hesitate to call me at (303)312-7309 if you have any questions.

Sincerely,

David A. Carson, Senior Trial Counsel
Environmental Defense Section

enclosure

cc: James Eppers
Steven Moores
Nathan Wiser
Richard Witt

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Samson Hydrocarbons Company, Petitioner, v. United States Environmental Protection Agency, Respondent.	)	Case Nos. 01-3672 and 01-4304
Murphy Exploration & Production Company, Petitioner, v. United States Environmental Protection Agency, Respondent.	)	Case No. 01-3936

EPA'S RESPONSE TO STATEMENT OF INTEREST OF NON-PARTY MARATHON OIL COMPANY AND REQUEST BY MARATHON OIL COMPANY TO DELAY RULING ON EPA'S MOTION TO TRANSFER

INTRODUCTION

EPA has moved to transfer these cases to the Tenth Circuit, and petitioners have opposed the motion. One of the bases for EPA's motion to transfer is that the Marathon Oil Company ("Marathon") has filed a petition in the Tenth Circuit challenging the same order challenged by Petitioners here. Marathon has filed a Notice in the Tenth Circuit informing that Court that it must transfer Marathon's petition to this Court under 28 U.S.C. § 2112(a)(5). Marathon has filed a statement in this Court in which it requests that this Court delay its consideration of EPA's

motion to transfer until after the Tenth Circuit transfers the Marathon petition to this Court so that Marathon can be heard on whether its petition should be transferred back to the Tenth Circuit where it originally filed its petition. As set forth below, EPA has no objection to Marathon stating its position to this Court on EPA's motion to transfer. However, the Court should not delay its ruling on EPA's motion to transfer. If Marathon would like to be heard, it should state its position at this time, and there is no reason why it cannot do so.

ARGUMENT

The Court Should Not Delay Consideration of EPA's Motion to Transfer Because Marathon Can Now Be Heard On That Motion.

In its recent filing with this Court, Marathon informs the Court that it has filed a Notice of Transfer in the Tenth Circuit. Marathon did not there take the position that this Court is a more convenient forum for it. Indeed, Marathon has not moved the Tenth Circuit for a transfer. Rather, it has informed the Tenth Circuit that it must transfer Marathon's petition to this Court under 28 U.S.C. § 2112(a)(5). See Attachment A to Marathon's Statement of Interest. EPA's response to Marathon's Tenth Circuit Notice is attached hereto. Marathon also notes that the Tenth Circuit is considering whether or not it has jurisdiction over Marathon's Tenth Circuit petition.[1] Marathon asks this Court to delay ruling on EPA's motion to transfer until after the Tenth Circuit both determines whether it has jurisdiction over Marathon's petition and transfers that petition to this Court at Marathon's request. However, the Court should not wait because Marathon can be heard now.

While EPA has no objection to Marathon's request to be heard on EPA's motion to

[1] Both EPA and Marathon have informed the Tenth Circuit that Marathon's petition was timely filed under EPA's regulations and that the Tenth Circuit has jurisdiction over the petition.

transfer, there is no need for Marathon to hold the parties and the Court in suspense. EPA has served on counsel for Marathon copies of all of its filings relating to its motion to transfer. Petitioners have apparently done likewise because Marathon is obviously aware of the position Petitioners have taken regarding Marathon's petition. See Marathon's Statement at ¶ 7. Indeed, Marathon now responds to some of the arguments that have been made by EPA and Petitioners. Id. at 6-7.[2] Thus, Marathon is obviously aware of the arguments that have been made on EPA's motion to transfer, and the filing of its recent papers proves that it need not be a party to these proceedings to have its voice heard. Accordingly, there is no need for the Court to delay ruling on EPA's motion to transfer in order to afford Marathon the opportunity to be heard. Marathon should state its position now.

Moreover, even if the Tenth Circuit transfers the Marathon petition to this Court, we find it hard to believe that Marathon could object to a transfer back to the Tenth Circuit where it originally filed its petition. The Tenth Circuit is obviously a convenient forum for Marathon because its counsel's office is just blocks away from the Tenth Circuit Courthouse.

---

[2] Marathon takes issue with a statement in EPA's reply memorandum in support of its motion to transfer regarding a discussion between Marathon's counsel and EPA's counsel on whether the Tenth Circuit is a more convenient forum for Marathon, whose counsel is in Denver. Id. at 6. EPA stands behind the statement in question. However, we also believe that it is incumbent upon Marathon to clear up any misunderstanding regarding its position by actually taking a position.

Respectfully submitted,

THOMAS L. SANSONETTI
Assistant Attorney General
Environment & Natural Resources Division

David A. Carson
U.S. Department of Justice
Environment and Natural Resources Division
Suite 945 - North Tower, 999 18th Street
Denver, Colorado 80202
(303) 312-7309

Of Counsel:

Richard T. Witt
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Steven B. Moores
Associate Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
Denver, Colorado 80202

James Eppers
Senior Enforcement Attorney
Legal Enforcement Program
U.S. Environmental Protection Agency
Denver, Colorado 80202

Date: February 8, 2002

CERTIFICATE OF SERVICE

It is hereby certified that on this date the undersigned caused a true and correct copy of the foregoing EPA's Response to Statement of Interest of Non-Party Marathon Oil Company and Request by Marathon Oil Company to Delay Ruling on EPA's Motion to Transfer to be mailed to the following counsel by first class United States mail.

Scott M. DuBoff
Wright & Talisman, P.C.
1200 G. Street, N.W.
Suite 600
Washington, D.C. 20005-3802

Elizabeth E. Mack
Locke Lidell, & Sapp, L.L.C.
2200 Ross Avenue
Suite 2200
Dallas, Texas 75201-6776

Thomas H. Chiacchio, Jr.
Blank Rome Comisky & McCauley, LLP
One Logan Square
Philadelphia, Pennsylvania 19103-6998

John D. Fognani
Lauren C. Buehler
555 17th Street, 26th Floor
Denver, CO 80202

Date: February 8, 2002

Linda Lutton

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Marathon Oil Company, Petitioner. v. United States Environmental Protection Agency, Respondent.	)	Case No. 01-9543

EPA'S RESPONSE TO MARATHON'S NOTICE OF TRANSFER

INTRODUCTION

On January 25, 2002, Petitioner Marathon Oil Company ("Marathon") filed a Notice of Transfer Pursuant to 28 U.S.C. § 2112. The Notice informs the Court that it is required to transfer Marathon's petition to the Third Circuit under 28 U.S.C. § 2112 because two previously filed appeals of the same EPA administrative order challenged by Marathon are now pending in that court. Those petitions are styled Samson Hydrocarbons Co. v. EPA, Nos. 01-3672 and 01-4304 (consolidated) (3rd Cir.), and Murphy Exploration & Production Co. v. EPA, No. 01-3936 (3rd Cir.). As is set forth in more detail below, if the Court decides to treat Marathon's Notice as a motion to transfer under 28 U.S.C. § 2112, then EPA does not necessarily object to the Court undertaking the purely ministerial task of transferring Marathon's petition to the Third Circuit. However, EPA notes that it has moved to transfer the Third Circuit Samson and Murphy petitions to this Court under 28 U.S.C. § 2112(a)(5). That motion will likewise apply to the Marathon petition if it is transferred to the Third Circuit. Therefore, EPA believes that the Marathon petition should ultimately be in this Court even if it is transferred to the Third Circuit at this time.

ARGUMENT

A. Marathon Should Have Requested A Transfer By Motion.

Rule 27(a)(1) of the Federal Rules of Appellate Procedure provides that "[a]n application for an order or other relief is made by motion unless these rules prescribe another form." Fed. R. App. P. 27(a)(1). The Rules do not prescribe that Marathon may request a transfer under 28 U.S.C. 2112(a) by the filing of a Notice. In its Notice, Marathon states "assuming that this Court finds that Marathon's Petition for Review was timely filed and that this Court therefore has jurisdiction, this proceeding must be transferred to the Third Circuit pursuant to 28 U.S.C. § 2112(a)(5)." Marathon's Notice at 2.[1] Thus, while Marathon's Notice informs the Court that it must transfer its petition, under Rule 27, it should have requested this relief by motion even if a transfer is required by 28 U.S.C. § 2112(a)(5).

B. Assuming the Court Decides to Treat Marathon's Notice as a Motion, EPA Does Not Necessarily Oppose the Relief Marathon Requests.

As Marathon points out in its Notice, the Third Circuit Samson and Murphy petitions were filed prior to the Tenth Circuit Marathon petition. 28 U.S.C. § 2112(a)(5) provides as follows:

> All courts in which proceedings are instituted with respect to the same order, other than the court in which the record is filed pursuant to this subsection, shall transfer those proceedings to the court in which the record is filed. For the convenience of the parties and in the interests of justice, the court in which the record is filed may thereafter transfer all the proceedings with respect to that order to any other court of appeals.

---

[1] In response to the jurisdictional issue posed by the Court in its December 21, 2001, letter to the parties, both EPA and Marathon have taken the position that Marathon's petition was timely filed under EPA's regulations and that the Court has jurisdiction over the petition.

28 U.S.C. § 2112(a)(5). 28 U.S.C. § 2112(a)(1) provides, in pertinent part, as follows:

> In all other cases in which proceedings have been instituted in two or more courts of appeals with respect to the same order, the agency . . . concerned shall file the record in the court in which proceedings with respect to the order were first instituted.

Id. at § 2112(a)(1). While EPA has filed the Certified Index to its Administrative Record in both this Court and the Third Circuit, reading 28 U.S.C. § 2112(a)(1) and (a)(5) together, the Third Circuit is the court in which "the record is filed" pursuant to subsection (a) of 28 U.S.C. § 2112 because the Third Circuit Samson and Murphy petitions were filed prior to the Tenth Circuit Marathon petition. Therefore, assuming that this Court determines that it has jurisdiction over Marathon's petition, EPA has no objection to this Court transferring the petition to the Third Circuit as a ministerial matter under 28 U.S.C. § 2112(a)(5), because the statute indicates that the Court "shall" do so under these circumstances.

EPA's lack of objection should not be viewed as an indication that EPA believes the Marathon petition belongs in the Third Circuit. As noted above, EPA has asked that court to transfer the Samson and Murphy petitions to this Court under 28 U.S.C. § 2112(a)(5) "for the convenience of the parties and in the interest of justice." While EPA will not go into detail here on the reasons for its motion in the Third Circuit, we note that Samson Hydrocarbons Company previously filed a petition in this Court challenging a similar EPA administrative order involving the very same groundwater contamination as the orders challenged in the Samson and Murphy Third Circuit petitions.[2] Therefore, the interests of justice favor having these similar proceedings

---

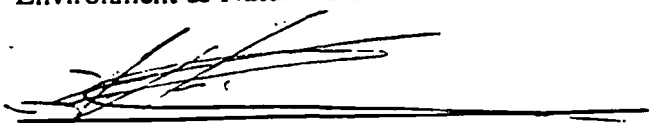
[2] That petition, Samson Hydrocarbons Co. v. EPA, No. 01-9500 (10th Cir.), has been in the Court's mediation program since it was filed and proceedings are currently stayed. After Samson filed that petition and before EPA issued the order that is challenged by Marathon here and by Samson and Murphy in the Third Circuit, the Third Circuit issued its decision in W.R. Grace v.

in this Court where the original Samson petition has long been pending. Moreover, both EPA's counsel and Marathon's counsel are located in Denver, while Samson's counsel is located in Dallas and Murphy's counsel is located in Washington, D.C. Accordingly, the convenience of the parties likewise favors a transfer of the Samson and Murphy Third Circuit petitions to this Court. The same will be true if this Court transfers the Marathon petition to the Third Circuit.

Therefore, while EPA does not object to a transfer of the Marathon petition to the Third Circuit at this time, it believes that the petition should eventually end up back in this Court along with the original Samson Tenth Circuit petition and the more recently filed Samson and Murphy Third Circuit petitions.

Respectfully Submitted,

THOMAS L. SANSONETTI
Assistant Attorney General
Environment & Natural Resources Division



David A. Carson
U.S. Department of Justice
Environment and Natural Resources Division
Suite 945 - North Tower, 999 18th Street
Denver, Colorado 80202
(303) 312-7309

EPA, 261 F.3d 330 (3rd Cir. 2001), in which the Third Circuit granted a petition for review challenging an EPA administrative order issued under the same statute as the order now challenged by Marathon, Samson and Murphy. Thus, it is not especially surprising that the companies apparently agreed that Marathon, who, as indicated in its Notice, could not have filed its petition in the Third Circuit, should wait until after the Samson and Murphy petitions were filed in the Third Circuit so that it could then ask for a transfer.

Of Counsel:

Richard T. Witt
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Steven B. Moores
Associate Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
Denver, Colorado 80202

James Eppers
Senior Enforcement Attorney
Legal Enforcement Program
U.S. Environmental Protection Agency
Denver, Colorado 80202

Date: February 8, 2002

CERTIFICATE OF SERVICE

It is hereby certified that on this date the undersigned caused a true and correct copy of the foregoing EPA's Response to Marathon's Notice of Transfer to be mailed to the following counsel of record by first class United States mail:

John D. Fognani
Lauren C. Buehler
555 17th Street, 26th Floor
Denver, CO 80202

Date: February 8, 2002

Linda Lutton

Linda Lutton

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Samson Hydrocarbons Company, Petitioner, v. United States Environmental Protection Agency, Respondent.	)	Case Nos. 01-3672 and 01-4304
Murphy Exploration & Production Company, Petitioner, v. United States Environmental Protection Agency, Respondent.	)	Case No. 01-3936

EPA'S RESPONSE TO STATEMENT OF INTEREST OF NON-PARTY MARATHON OIL COMPANY AND REQUEST BY MARATHON OIL COMPANY TO DELAY RULING ON EPA'S MOTION TO TRANSFER

INTRODUCTION

EPA has moved to transfer these cases to the Tenth Circuit, and petitioners have opposed the motion. One of the bases for EPA's motion to transfer is that the Marathon Oil Company ("Marathon") has filed a petition in the Tenth Circuit challenging the same order challenged by Petitioners here. Marathon has filed a Notice in the Tenth Circuit informing that Court that it must transfer Marathon's petition to this Court under 28 U.S.C. § 2112(a)(5). Marathon has filed a statement in this Court in which it requests that this Court delay its consideration of EPA's

motion to transfer until after the Tenth Circuit transfers the Marathon petition to this Court so that Marathon can be heard on whether its petition should be transferred back to the Tenth Circuit where it originally filed its petition. As set forth below, EPA has no objection to Marathon stating its position to this Court on EPA's motion to transfer. However, the Court should not delay its ruling on EPA's motion to transfer. If Marathon would like to be heard, it should state its position at this time, and there is no reason why it cannot do so.

ARGUMENT

The Court Should Not Delay Consideration of EPA's Motion to Transfer Because Marathon Can Now Be Heard On That Motion.

In its recent filing with this Court, Marathon informs the Court that it has filed a Notice of Transfer in the Tenth Circuit. Marathon did not there take the position that this Court is a more convenient forum for it. Indeed. Marathon has not moved the Tenth Circuit for a transfer. Rather, it has informed the Tenth Circuit that it must transfer Marathon's petition to this Court under 28 U.S.C. § 2112(a)(5). See Attachment A to Marathon's Statement of Interest. EPA's response to Marathon's Tenth Circuit Notice is attached hereto. Marathon also notes that the Tenth Circuit is considering whether or not it has jurisdiction over Marathon's Tenth Circuit petition.[1] Marathon asks this Court to delay ruling on EPA's motion to transfer until after the Tenth Circuit both determines whether it has jurisdiction over Marathon's petition and transfers that petition to this Court at Marathon's request. However, the Court should not wait because Marathon can be heard now.

While EPA has no objection to Marathon's request to be heard on EPA's motion to

[1] Both EPA and Marathon have informed the Tenth Circuit that Marathon's petition was timely filed under EPA's regulations and that the Tenth Circuit has jurisdiction over the petition.

transfer, there is no need for Marathon to hold the parties and the Court in suspense. EPA has served on counsel for Marathon copies of all of its filings relating to its motion to transfer. Petitioners have apparently done likewise because Marathon is obviously aware of the position Petitioners have taken regarding Marathon's petition. See Marathon's Statement at ¶ 7. Indeed, Marathon now responds to some of the arguments that have been made by EPA and Petitioners. Id. at 6-7.[2] Thus, Marathon is obviously aware of the arguments that have been made on EPA's motion to transfer, and the filing of its recent papers proves that it need not be a party to these proceedings to have its voice heard. Accordingly, there is no need for the Court to delay ruling on EPA's motion to transfer in order to afford Marathon the opportunity to be heard. Marathon should state its position now.

Moreover, even if the Tenth Circuit transfers the Marathon petition to this Court, we find it hard to believe that Marathon could object to a transfer back to the Tenth Circuit where it originally filed its petition. The Tenth Circuit is obviously a convenient forum for Marathon because its counsel's office is just blocks away from the Tenth Circuit Courthouse.

---

[2] Marathon takes issue with a statement in EPA's reply memorandum in support of its motion to transfer regarding a discussion between Marathon's counsel and EPA's counsel on whether the Tenth Circuit is a more convenient forum for Marathon, whose counsel is in Denver. Id. at 6. EPA stands behind the statement in question. However, we also believe that it is incumbent upon Marathon to clear up any misunderstanding regarding its position by actually taking a position.

Respectfully submitted,

THOMAS L. SANSONETTI
Assistant Attorney General
Environment & Natural Resources Division

David A. Carson
U.S. Department of Justice
Environment and Natural Resources Division
Suite 945 - North Tower, 999 18th Street
Denver, Colorado 80202
(303) 312-7309

Of Counsel:

Richard T. Witt
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Steven B. Moores
Associate Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
Denver, Colorado 80202

James Eppers
Senior Enforcement Attorney
Legal Enforcement Program
U.S. Environmental Protection Agency
Denver, Colorado 80202

Date: February 8, 2002

CERTIFICATE OF SERVICE

It is hereby certified that on this date the undersigned caused a true and correct copy of the foregoing EPA's Response to Statement of Interest of Non-Party Marathon Oil Company and Request by Marathon Oil Company to Delay Ruling on EPA's Motion to Transfer to be mailed to the following counsel by first class United States mail.

Scott M. DuBoff
Wright & Talisman, P.C.
1200 G. Street, N.W.
Suite 600
Washington, D.C. 20005-3802

Elizabeth E. Mack
Locke Lidell, & Sapp, L.L.C.
2200 Ross Avenue
Suite 2200
Dallas, Texas 75201-6776

Thomas H. Chiacchio, Jr.
Blank Rome Comisky & McCauley, LLP
One Logan Square
Philadelphia, Pennsylvania 19103-6998

John D. Fognani
Lauren C. Buehler
555 17th Street, 26th Floor
Denver, CO 80202

Date: February 8, 2002

Linda Lutton

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Marathon Oil Company,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 01-9543
	)	
United States Environmental Protection Agency,	)	
	)	
Respondent.	)	
	)	

EPA'S RESPONSE TO MARATHON'S NOTICE OF TRANSFER

INTRODUCTION

On January 25, 2002, Petitioner Marathon Oil Company ("Marathon") filed a Notice of Transfer Pursuant to 28 U.S.C. § 2112. The Notice informs the Court that it is required to transfer Marathon's petition to the Third Circuit under 28 U.S.C. § 2112 because two previously filed appeals of the same EPA administrative order challenged by Marathon are now pending in that court. Those petitions are styled Samson Hydrocarbons Co. v. EPA, Nos. 01-3672 and 01-4304 (consolidated) (3rd Cir.), and Murphy Exploration & Production Co. v. EPA, No. 01-3936 (3rd Cir.). As is set forth in more detail below, if the Court decides to treat Marathon's Notice as a motion to transfer under 28 U.S.C. § 2112, then EPA does not necessarily object to the Court undertaking the purely ministerial task of transferring Marathon's petition to the Third Circuit. However, EPA notes that it has moved to transfer the Third Circuit Samson and Murphy petitions to this Court under 28 U.S.C. § 2112(a)(5). That motion will likewise apply to the Marathon petition if it is transferred to the Third Circuit. Therefore, EPA believes that the Marathon petition should ultimately be in this Court even if it is transferred to the Third Circuit at this time.

ARGUMENT

A. Marathon Should Have Requested A Transfer By Motion.

Rule 27(a)(1) of the Federal Rules of Appellate Procedure provides that "[a]n application for an order or other relief is made by motion unless these rules prescribe another form." Fed. R. App. P. 27(a)(1). The Rules do not prescribe that Marathon may request a transfer under 28 U.S.C. 2112(a) by the filing of a Notice. In its Notice, Marathon states "assuming that this Court finds that Marathon's Petition for Review was timely filed and that this Court therefore has jurisdiction, this proceeding must be transferred to the Third Circuit pursuant to 28 U.S.C. § 2112(a)(5)." Marathon's Notice at 2.[1] Thus, while Marathon's Notice informs the Court that it must transfer its petition, under Rule 27, it should have requested this relief by motion even if a transfer is required by 28 U.S.C. § 2112(a)(5).

B. Assuming the Court Decides to Treat Marathon's Notice as a Motion, EPA Does Not Necessarily Oppose the Relief Marathon Requests.

As Marathon points out in its Notice, the Third Circuit Samson and Murphy petitions were filed prior to the Tenth Circuit Marathon petition. 28 U.S.C. § 2112(a)(5) provides as follows:

> All courts in which proceedings are instituted with respect to the same order, other than the court in which the record is filed pursuant to this subsection, shall transfer those proceedings to the court in which the record is filed. For the convenience of the parties and in the interests of justice, the court in which the record is filed may thereafter transfer all the proceedings with respect to that order to any other court of appeals.

---

[1] In response to the jurisdictional issue posed by the Court in its December 21, 2001, letter to the parties, both EPA and Marathon have taken the position that Marathon's petition was timely filed under EPA's regulations and that the Court has jurisdiction over the petition.

28 U.S.C. § 2112(a)(5). 28 U.S.C. § 2112(a)(1) provides, in pertinent part, as follows:

> In all other cases in which proceedings have been instituted in two or more courts of appeals with respect to the same order, the agency . . . concerned shall file the record in the court in which proceedings with respect to the order were first instituted.

Id. at § 2112(a)(1). While EPA has filed the Certified Index to its Administrative Record in both this Court and the Third Circuit, reading 28 U.S.C. § 2112(a)(1) and (a)(5) together, the Third Circuit is the court in which "the record is filed" pursuant to subsection (a) of 28 U.S.C. § 2112 because the Third Circuit Samson and Murphy petitions were filed prior to the Tenth Circuit Marathon petition. Therefore, assuming that this Court determines that it has jurisdiction over Marathon's petition, EPA has no objection to this Court transferring the petition to the Third Circuit as a ministerial matter under 28 U.S.C. § 2112(a)(5), because the statute indicates that the Court "shall" do so under these circumstances.

EPA's lack of objection should not be viewed as an indication that EPA believes the Marathon petition belongs in the Third Circuit. As noted above, EPA has asked that court to transfer the Samson and Murphy petitions to this Court under 28 U.S.C. § 2112(a)(5) "for the convenience of the parties and in the interest of justice." While EPA will not go into detail here on the reasons for its motion in the Third Circuit, we note that Samson Hydrocarbons Company previously filed a petition in this Court challenging a similar EPA administrative order involving the very same groundwater contamination as the orders challenged in the Samson and Murphy Third Circuit petitions.[2] Therefore, the interests of justice favor having these similar proceedings

---

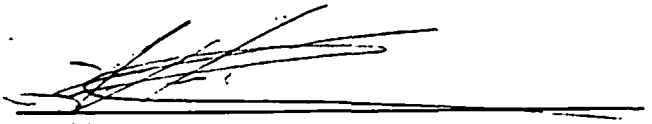
[2] That petition, Samson Hydrocarbons Co. v. EPA, No. 01-9500 (10th Cir.), has been in the Court's mediation program since it was filed and proceedings are currently stayed. After Samson filed that petition and before EPA issued the order that is challenged by Marathon here and by Samson and Murphy in the Third Circuit, the Third Circuit issued its decision in W.R. Grace v.

in this Court where the original Samson petition has long been pending. Moreover, both EPA's counsel and Marathon's counsel are located in Denver, while Samson's counsel is located in Dallas and Murphy's counsel is located in Washington, D.C. Accordingly, the convenience of the parties likewise favors a transfer of the Samson and Murphy Third Circuit petitions to this Court. The same will be true if this Court transfers the Marathon petition to the Third Circuit.

Therefore, while EPA does not object to a transfer of the Marathon petition to the Third Circuit at this time, it believes that the petition should eventually end up back in this Court along with the original Samson Tenth Circuit petition and the more recently filed Samson and Murphy Third Circuit petitions.

Respectfully Submitted,

THOMAS L. SANSONETTI
Assistant Attorney General
Environment & Natural Resources Division



David A. Carson
U.S. Department of Justice
Environment and Natural Resources Division
Suite 945 - North Tower, 999 18th Street
Denver, Colorado 80202
(303) 312-7309

EPA, 261 F.3d 330 (3rd Cir. 2001), in which the Third Circuit granted a petition for review challenging an EPA administrative order issued under the same statute as the order now challenged by Marathon, Samson and Murphy. Thus, it is not especially surprising that the companies apparently agreed that Marathon, who, as indicated in its Notice, could not have filed its petition in the Third Circuit, should wait until after the Samson and Murphy petitions were filed in the Third Circuit so that it could then ask for a transfer.

Of Counsel:

Richard T. Witt
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Steven B. Moores
Associate Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
Denver, Colorado 80202

James Eppers
Senior Enforcement Attorney
Legal Enforcement Program
U.S. Environmental Protection Agency
Denver, Colorado 80202

Date: February 8, 2002

CERTIFICATE OF SERVICE

It is hereby certified that on this date the undersigned caused a true and correct copy of the foregoing EPA's Response to Marathon's Notice of Transfer to be mailed to the following counsel of record by first class United States mail:

John D. Fognani
Lauren C. Buehler
555 17th Street, 26th Floor
Denver, CO 80202

Date: February 8, 2002

Linda Lutton

Linda Lutton

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Marathon Oil Company, Petitioner, v. United States Environmental Protection Agency, Respondent.	)	Case No. 01-9543

EPA'S RESPONSE TO MARATHON'S NOTICE OF TRANSFER

INTRODUCTION

On January 25, 2002, Petitioner Marathon Oil Company ("Marathon") filed a Notice of Transfer Pursuant to 28 U.S.C. § 2112. The Notice informs the Court that it is required to transfer Marathon's petition to the Third Circuit under 28 U.S.C. § 2112 because two previously filed appeals of the same EPA administrative order challenged by Marathon are now pending in that court. Those petitions are styled Samson Hydrocarbons Co. v. EPA, Nos. 01-3672 and 01-4304 (consolidated) (3rd Cir.), and Murphy Exploration & Production Co. v. EPA, No. 01-3936 (3rd Cir.). As is set forth in more detail below, if the Court decides to treat Marathon's Notice as a motion to transfer under 28 U.S.C. § 2112, then EPA does not necessarily object to the Court undertaking the purely ministerial task of transferring Marathon's petition to the Third Circuit. However, EPA notes that it has moved to transfer the Third Circuit Samson and Murphy petitions to this Court under 28 U.S.C. § 2112(a)(5). That motion will likewise apply to the Marathon petition if it is transferred to the Third Circuit. Therefore, EPA believes that the Marathon petition should ultimately be in this Court even if it is transferred to the Third Circuit at this time.

ARGUMENT

A. Marathon Should Have Requested A Transfer By Motion.

Rule 27(a)(1) of the Federal Rules of Appellate Procedure provides that "[a]n application for an order or other relief is made by motion unless these rules prescribe another form." Fed. R. App. P. 27(a)(1). The Rules do not prescribe that Marathon may request a transfer under 28 U.S.C. 2112(a) by the filing of a Notice. In its Notice, Marathon states "assuming that this Court finds that Marathon's Petition for Review was timely filed and that this Court therefore has jurisdiction, this proceeding must be transferred to the Third Circuit pursuant to 28 U.S.C. § 2112(a)(5)." Marathon's Notice at 2.[1] Thus, while Marathon's Notice informs the Court that it must transfer its petition, under Rule 27, it should have requested this relief by motion even if a transfer is required by 28 U.S.C. § 2112(a)(5).

B. Assuming the Court Decides to Treat Marathon's Notice as a Motion, EPA Does Not Necessarily Oppose the Relief Marathon Requests.

As Marathon points out in its Notice, the Third Circuit Samson and Murphy petitions were filed prior to the Tenth Circuit Marathon petition. 28 U.S.C. § 2112(a)(5) provides as follows:

> All courts in which proceedings are instituted with respect to the same order, other than the court in which the record is filed pursuant to this subsection, shall transfer those proceedings to the court in which the record is filed. For the convenience of the parties and in the interests of justice, the court in which the record is filed may thereafter transfer all the proceedings with respect to that order to any other court of appeals.

---

[1] In response to the jurisdictional issue posed by the Court in its December 21, 2001, letter to the parties, both EPA and Marathon have taken the position that Marathon's petition was timely filed under EPA's regulations and that the Court has jurisdiction over the petition.

28 U.S.C. § 2112(a)(5). 28 U.S.C. § 2112(a)(1) provides, in pertinent part, as follows:

> In all other cases in which proceedings have been instituted in two or more courts of appeals with respect to the same order, the agency . . . concerned shall file the record in the court in which proceedings with respect to the order were first instituted.

Id. at § 2112(a)(1). While EPA has filed the Certified Index to its Administrative Record in both this Court and the Third Circuit, reading 28 U.S.C. § 2112(a)(1) and (a)(5) together, the Third Circuit is the court in which "the record is filed" pursuant to subsection (a) of 28 U.S.C. § 2112 because the Third Circuit Samson and Murphy petitions were filed prior to the Tenth Circuit Marathon petition. Therefore, assuming that this Court determines that it has jurisdiction over Marathon's petition, EPA has no objection to this Court transferring the petition to the Third Circuit as a ministerial matter under 28 U.S.C. § 2112(a)(5), because the statute indicates that the Court "shall" do so under these circumstances.

EPA's lack of objection should not be viewed as an indication that EPA believes the Marathon petition belongs in the Third Circuit. As noted above, EPA has asked that court to transfer the Samson and Murphy petitions to this Court under 28 U.S.C. § 2112(a)(5) "for the convenience of the parties and in the interest of justice." While EPA will not go into detail here on the reasons for its motion in the Third Circuit, we note that Samson Hydrocarbons Company previously filed a petition in this Court challenging a similar EPA administrative order involving the very same groundwater contamination as the orders challenged in the Samson and Murphy Third Circuit petitions.[2/] Therefore, the interests of justice favor having these similar proceedings

---

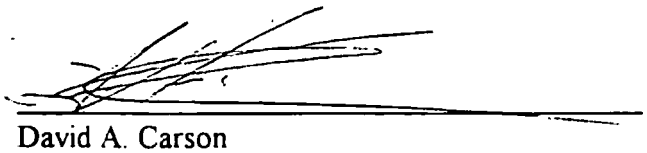
[2/].That petition, Samson Hydrocarbons Co. v. EPA, No. 01-9500 (10th Cir.), has been in the Court's mediation program since it was filed and proceedings are currently stayed. After Samson filed that petition and before EPA issued the order that is challenged by Marathon here and by Samson and Murphy in the Third Circuit, the Third Circuit issued its decision in W.R. Grace v.

in this Court where the original Samson petition has long been pending. Moreover, both EPA's counsel and Marathon's counsel are located in Denver, while Samson's counsel is located in Dallas and Murphy's counsel is located in Washington, D.C. Accordingly, the convenience of the parties likewise favors a transfer of the Samson and Murphy Third Circuit petitions to this Court. The same will be true if this Court transfers the Marathon petition to the Third Circuit.

Therefore, while EPA does not object to a transfer of the Marathon petition to the Third Circuit at this time, it believes that the petition should eventually end up back in this Court along with the original Samson Tenth Circuit petition and the more recently filed Samson and Murphy Third Circuit petitions.

Respectfully Submitted,

THOMAS L. SANSONETTI
Assistant Attorney General
Environment & Natural Resources Division



David A. Carson
U.S. Department of Justice
Environment and Natural Resources Division
Suite 945 - North Tower, 999 18th Street
Denver, Colorado 80202
(303) 312-7309

EPA, 261 F.3d 330 (3rd Cir. 2001), in which the Third Circuit granted a petition for review challenging an EPA administrative order issued under the same statute as the order now challenged by Marathon, Samson and Murphy. Thus, it is not especially surprising that the companies apparently agreed that Marathon, who, as indicated in its Notice, could not have filed its petition in the Third Circuit, should wait until after the Samson and Murphy petitions were filed in the Third Circuit so that it could then ask for a transfer.

Of Counsel:

Richard T. Witt
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Steven B. Moores
Associate Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
Denver, Colorado 80202

James Eppers
Senior Enforcement Attorney
Legal Enforcement Program
U.S. Environmental Protection Agency
Denver, Colorado 80202

Date: February 8, 2002

CERTIFICATE OF SERVICE

It is hereby certified that on this date the undersigned caused a true and correct copy of the foregoing EPA's Response to Marathon's Notice of Transfer to be mailed to the following counsel of record by first class United States mail:

John D. Fognani
Lauren C. Buehler
555 17th Street, 26th Floor
Denver, CO 80202

Date: February 8, 2002

Linda Lutton

Linda Lutton

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SAMSON HYDROCARBONS COMPANY, Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent	)	Case Nos. 01-3672 and 01-4304 (Consolidated)
MURPHY EXPLORATION & PRODUCTION COMPANY, Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent	)	Case No. 01-3936

REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE SURREPLY

Petitioners Murphy Exploration & Production Company (Murphy) and Samson Hydrocarbons Company (Samson) submit this reply in support of their motion for leave to file a surreply concerning Respondent United States Environmental Protection Agency's (EPA) pending motions to transfer these cases. Contrary to EPA's January 29, 2002 Memorandum in Opposition, Petitioners' surreply does not reargue previous matters and instead fully satisfies the good cause standard for authorizing a surreply by addressing a serious inconsistency that is poignantly exposed in EPA's reply in support of its motions to transfer.

More specifically, EPA's transfer motions ask this Court to assume that the Marathon petition before the Tenth Circuit (Marathon Oil Co. v. U.S. Environmental Protection Agency, Case No. 01-9543) is jurisdictionally viable for purposes of 42 U.S.C. § 300j-7(a). But when the jurisdictionally questionable nature of the Marathon petition was noted in Petitioners' opposition to EPA's transfer motions, EPA responded by reserving the right to argue that the Marathon petition is jurisdictionally infirm. As Petitioners' proposed surreply explains, EPA cannot have

it both ways: the interests of justice are not served by transferring a case based on the convenience of a petitioner who appears subject to dismissal, particularly given the importance of honoring the jurisdictionally viable petitioners' choice of forum. Moreover, EPA's statement that it "has not yet decided what position it will take" on the jurisdictional viability of the Marathon petition (EPA's Jan. 29 Mem. in Opposition, p.3) is suspect -- each fact relevant to 42 U.S.C. § 300j-7(a) jurisdiction has been known to EPA since November. The statement also disregards proper procedure. See Hughes v. Sharp, 476 F.2d 975, 976 (9th Cir. 1973) ("The proper course when counsel learns of a defect in [appellate] jurisdiction was to file a motion to dismiss the appeal" rather than deferring the issue to briefing on the merits).

In view of these matters, Murphy and Samson respectfully request that the Court grant leave to file their January 21 surreply in opposition to EPA's motions to transfer.

Respectfully submitted,

Scott M. DuBoff
WRIGHT & TALISMAN, P.C.
1200 G Street NW, Suite 600
Washington, DC 20005-3802
(202) 393-1200

Counsel for Petitioner
Murphy Exploration & Production Company

Elizabeth E. Mack

Elizabeth E. Mack
LOCKE LIDDELL & SAPP LLP
2200 Ross Avenue, Suite 2200
Dallas, TX 75201-6776
(214) 740-8000

Counsel for Petitioner
Samson Hydrocarbons Company

Dated: February 6, 2002

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SAMSON HYDROCARBONS COMPANY, et al, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent	)	Case Nos. 01-3936, 01-3672 and 01-4304

CERTIFICATE OF SERVICE

I hereby certify that I have this 6th day of February 2002 caused copies of the foregoing Reply in Support of Motion for Leave to File Surreply to be served upon each of the persons listed below by delivering copies thereof to the U.S. Postal Service with postage prepaid and addressed as follows:

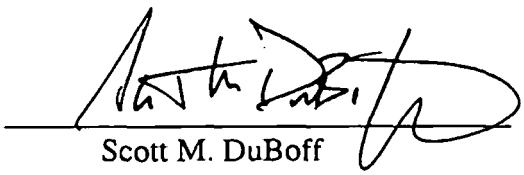
James Eppers
U.S. Environmental Protection Agency
Region 8 - 8ENF-T
999 18th Street, Suite 300
Denver, CO 80202-2466

Steve Leifer
Baker Botts LLP
The Warner
1299 Pennsylvania Avenue NW
Washington, DC 20004-2400

David A. Carson
United States Department of Justice
999 18th Street, Suite 945 North Tower
Denver, CO 80202

John D. Fognani
Fognani Guibord Homsy & Roberts, LLP
555 -- 17th Street, 26th Floor
Denver, CO 80202

Candace J. Walker
Marathon Oil Company
5555 San Felipe
Houston, TX 77210-4813



Scott M. DuBoff

U.S. Department of Justice

Environment and Natural Resources Division

LJG:DAC

David A. Carson
Environmental Defense Section
999 18th Street
Suite 945 North Tower
Denver, CO 80202

Telephone (303) 312-7309
Facsimile (303) 312-7331

January 29, 2002

via federal express

Marcia M. Waldron, Clerk
21400 United States Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106-1790
Attn: Lynn Caswell Lopez

Re: Samson Hydrocarbons Co. v. EPA, Nos. 01-3672 & 01-4304 (3rd Cir.)(consolidated); Murphy Exploration and Production Co. v. EPA, No. 01-3936

Dear Ms. Lopez:

Enclosed please find two originals and six copies of each of the following: 1.) EPA's Memorandum in Opposition to Petitioners' Joint Motion to File a Surreply in Opposition to EPA's Motion to Transfer, and 2.) EPA's Notice of Filing Regarding Jurisdictional Issue in Tenth Circuit, and Notice of Mistaken Statement in EPA's Reply Memorandum in Support of Motion to Transfer. There is one original and three copies of each document for each case. Copies have been served in accordance with the attached Certificates of Service.

Please do not hesitate to call me at (303)312-7309 if you have any questions.

Sincerely,

David A. Carson, Senior Trial Counsel
Environmental Defense Section

enclosure

cc: James Eppers
Steven Moores
Nathan Wiser
Richard Witt

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Samson Hydrocarbons Company, Petitioner, v. United States Environmental Protection Agency, Respondent.	)	Case Nos. 01-3672 and 01-4304
Murphy Exploration & Production Company, Petitioner, v. United States Environmental Protection Agency, Respondent.	)	Case No. 01-3936

EPA'S MEMORANDUM IN OPPOSITION TO PETITIONERS' JOINT MOTION TO FILE A SURREPLY IN OPPOSITION TO EPA'S MOTION TO TRANSFER

Petitioners have now moved to file a surreply memorandum in opposition to EPA's motion to transfer these petitions to the Tenth Circuit. As is shown below, Petitioners' motion should be denied because Petitioners only seek to re-argue an issue they first raised in their original memorandum in opposition to EPA's motion to transfer.

ARGUMENT

Petitioners Should Not Be Allowed to File their Surreply Because it Re-argues an Issue Raised by Petitioners in Their Opposition Memorandum.

"The standard for granting a leave to file a surreply is whether the party making the

motion would be unable to contest matters presented to the court for the first time in the opposing party's reply." Lewis v. Rumsfield, 154 F.Supp.2d. 56, 61 (D.D.C. 2001). In their motion to file a surreply, Petitions argue that a surreply is necessary because EPA has allegedly not disclosed a jurisdictional limitation on the scope of the Marathon petition pending in the Tenth Circuit. However, Petitioners specifically raised the scope of Marathon's petition as an issue in their memorandum in opposition to EPA's motion to transfer. See Petitioners' Memorandum in Opposition at 5-6. In its reply memorandum, EPA explained that it was not taking any position on the scope of Marathon's petition at this time, and pointed out that the scope of Marathon's petition would most certainly have to be determined when the petition was briefed on its merits. EPA's Reply Memorandum at 4. Thus, the issue of whether the scope of Marathon's petition supports a transfer of these cases to Tenth Circuit was not raised by EPA for the first time in its reply memorandum, but rather was raised for the first time by Petitioners in their opposition. Therefore, Petitioners' attempt to take a second bite of the apple through a surreply memorandum should be denied.

Moreover, it is clear from Petitioners' proposed surreply that Petitioners only want to re-argue the issue with a new gloss. Petitioners now seek to assert that Marathon entirely lacks standing to challenge EPA's October 3, 2001, amended order because the only issues Marathon may raise - -the changing of certain deadlines in EPA's September 20, 2001, order at the Companies' request, and the elimination of Samson Investment Company as a respondent to the order at Samson's request - - do not cause any injury to Marathon. Petitioners' proposed surreply at 2. While Petitioners did not cast their argument as a jurisdictional one before, it was clearly available to them. Indeed, Petitioners specifically argued in their opposition that

Marathon's petition was limited to the very issues that Petitioners now claim cause Marathon no harm. Petitioners Opposition at 5-6.[1]

While Petitioners chide EPA for not taking any position regarding the scope of Marathon's petition at this time, the fact of the matter is that EPA has not yet decided what position it will take, if any, regarding the scope of Marathon's petition.[2] Nor is it now required to do so. Neither the scope of Marathon's petition nor whether Marathon has standing in the Tenth Circuit are issues that can be resolved by this Court at this time. In fact, Petitioners do not even dispute the point that was raised in EPA's reply memorandum, which is that the scope of Marathon's petition would have to be determined when the parties brief the merits of the petition. Even if EPA were to make the argument advanced by Petitioners here, the Tenth Circuit may disagree with that argument. It is the possibility that both the Tenth Circuit and this Court will be considering the same issues in a manner that could lead to inconsistent judgments - - due to the existence of both the Marathon Tenth Circuit petition and the previously filed Samson Tenth Circuit petition - - along with the other reasons stated in EPA's previous memoranda, that make a transfer of these cases to the Tenth Circuit necessary.

---

[1] It is more than a little ironic that Petitioners argue that a surreply is necessary because EPA's "reply memorandum fails to apprise this Court of essential facts concerning the Tenth Circuit case." Joint Motion at 2. If anyone failed to apprise this Court of anything, it was Petitioners. The so-called "essential facts" boil down to an extension of the same argument Petitioners made when they actually had the chance to do so. An argument that EPA did not make in its reply, and that Petitioners wish they had made in their opposition, cannot support the filing of Petitioners' proposed surreply memorandum.

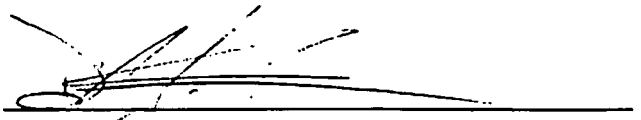
[2] EPA agrees that Marathon is not likely to argue that its petition is limited to those issues set forth by Samson and Murphy. If EPA does not raise the issue, then it will likely not be an issue.

CONCLUSION

For these reasons, the Court should deny Petitioners' joint motion to file a surreply memorandum.

Respectfully submitted,

THOMAS L. SANSONETTI
Assistant Attorney General
Environment & Natural Resources Division



David A. Carson
U.S. Department of Justice
Environment and Natural Resources Division
Suite 945 - North Tower, 999 18th Street
Denver, Colorado 80202
(303) 312-7309

Of Counsel:

Richard T. Witt
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Steven B. Moores
Associate Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
Denver, Colorado 80202

James Eppers
Senior Enforcement Attorney
Legal Enforcement Program
U.S. Environmental Protection Agency
Denver, Colorado 80202

Date: January 29, 2002

CERTIFICATE OF SERVICE

It is hereby certified that on this date the undersigned caused a true and correct copy of the foregoing EPA's Memorandum in Opposition to Petitioners' Joint Motion to File a Surreply in Opposition to EPA's Motion to Transfer to be mailed to the following counsel by first class United States mail.

Scott M. DuBoff
Wright & Talisman, P.C.
1200 G. Street, N.W.
Suite 600
Washington, D.C. 20005-3802

Elizabeth E. Mack
Locke Lidell, & Sapp, L.L.C.
2200 Ross Avenue
Suite 2200
Dallas, Texas 75201-6776

Thomas H. Chiacchio, Jr.
Blank Rome Comisky & McCauley, LLP
One Logan Square
Philadelphia, Pennsylvania 19103-6998

With a courtesy copy to:

John D. Fognani
Lauren C. Buehler
555 17th Street, 26th Floor
Denver, CO 80202

Date: January 29, 2002

Linda Lutton

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Samson Hydrocarbons Company, Petitioner, v. United States Environmental Protection Agency, Respondent.	)	Case Nos. 01-3672 and 01-4304
Murphy Exploration & Production Company, Petitioner, v. United States Environmental Protection Agency, Respondent.	)	Case No. 01-3936

EPA'S MEMORANDUM IN OPPOSITION TO PETITIONERS' JOINT MOTION TO FILE A SURREPLY IN OPPOSITION TO EPA'S MOTION TO TRANSFER

Petitioners have now moved to file a surreply memorandum in opposition to EPA's motion to transfer these petitions to the Tenth Circuit. As is shown below, Petitioners' motion should be denied because Petitioners only seek to re-argue an issue they first raised in their original memorandum in opposition to EPA's motion to transfer.

ARGUMENT

Petitioners Should Not Be Allowed to File their Surreply Because it Re-argues an Issue Raised by Petitioners in Their Opposition Memorandum.

"The standard for granting a leave to file a surreply is whether the party making the

motion would be unable to contest matters presented to the court for the first time in the opposing party's reply." Lewis v. Rumsfield, 154 F.Supp.2d. 56, 61 (D.D.C. 2001). In their motion to file a surreply, Petitions argue that a surreply is necessary because EPA has allegedly not disclosed a jurisdictional limitation on the scope of the Marathon petition pending in the Tenth Circuit. However, Petitioners specifically raised the scope of Marathon's petition as an issue in their memorandum in opposition to EPA's motion to transfer. See Petitioners' Memorandum in Opposition at 5-6. In its reply memorandum, EPA explained that it was not taking any position on the scope of Marathon's petition at this time, and pointed out that the scope of Marathon's petition would most certainly have to be determined when the petition was briefed on its merits. EPA's Reply Memorandum at 4. Thus, the issue of whether the scope of Marathon's petition supports a transfer of these cases to Tenth Circuit was not raised by EPA for the first time in its reply memorandum, but rather was raised for the first time by Petitioners in their opposition. Therefore, Petitioners' attempt to take a second bite of the apple through a surreply memorandum should be denied.

Moreover, it is clear from Petitioners' proposed surreply that Petitioners only want to re-argue the issue with a new gloss. Petitioners now seek to assert that Marathon entirely lacks standing to challenge EPA's October 3, 2001, amended order because the only issues Marathon may raise - -the changing of certain deadlines in EPA's September 20, 2001, order at the Companies' request, and the elimination of Samson Investment Company as a respondent to the order at Samson's request - - do not cause any injury to Marathon. Petitioners' proposed surreply at 2. While Petitioners did not cast their argument as a jurisdictional one before, it was clearly available to them. Indeed, Petitioners specifically argued in their opposition that

Marathon's petition was limited to the very issues that Petitioners now claim cause Marathon no harm. Petitioners Opposition at 5-6.[1]

While Petitioners chide EPA for not taking any position regarding the scope of Marathon's petition at this time, the fact of the matter is that EPA has not yet decided what position it will take, if any, regarding the scope of Marathon's petition.[2] Nor is it now required to do so. Neither the scope of Marathon's petition nor whether Marathon has standing in the Tenth Circuit are issues that can be resolved by this Court at this time. In fact, Petitioners do not even dispute the point that was raised in EPA's reply memorandum, which is that the scope of Marathon's petition would have to be determined when the parties brief the merits of the petition. Even if EPA were to make the argument advanced by Petitioners here, the Tenth Circuit may disagree with that argument. It is the possibility that both the Tenth Circuit and this Court will be considering the same issues in a manner that could lead to inconsistent judgments - - due to the existence of both the Marathon Tenth Circuit petition and the previously filed Samson Tenth Circuit petition - - along with the other reasons stated in EPA's previous memoranda, that make a transfer of these cases to the Tenth Circuit necessary.

---

[1] It is more than a little ironic that Petitioners argue that a surreply is necessary because EPA's "reply memorandum fails to apprise this Court of essential facts concerning the Tenth Circuit case." Joint Motion at 2. If anyone failed to apprise this Court of anything, it was Petitioners. The so-called "essential facts" boil down to an extension of the same argument Petitioners made when they actually had the chance to do so. An argument that EPA did not make in its reply, and that Petitioners wish they had made in their opposition, cannot support the filing of Petitioners' proposed surreply memorandum.

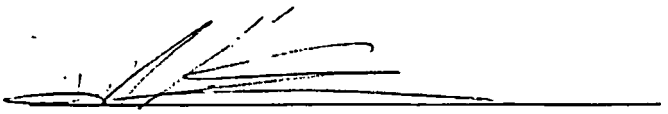
[2] EPA agrees that Marathon is not likely to argue that its petition is limited to those issues set forth by Samson and Murphy. If EPA does not raise the issue, then it will likely not be an issue.

CONCLUSION

For these reasons, the Court should deny Petitioners' joint motion to file a surreply memorandum.

Respectfully submitted,

THOMAS L. SANSONETTI
Assistant Attorney General
Environment & Natural Resources Division



David A. Carson
U.S. Department of Justice
Environment and Natural Resources Division
Suite 945 - North Tower, 999 18th Street
Denver, Colorado 80202
(303) 312-7309

Of Counsel:

Richard T. Witt
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Steven B. Moores
Associate Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
Denver, Colorado 80202

James Eppers
Senior Enforcement Attorney
Legal Enforcement Program
U.S. Environmental Protection Agency
Denver, Colorado 80202

Date: January 29, 2002

CERTIFICATE OF SERVICE

It is hereby certified that on this date the undersigned caused a true and correct copy of the foregoing EPA's Memorandum in Opposition to Petitioners' Joint Motion to File a Surreply in Opposition to EPA's Motion to Transfer to be mailed to the following counsel by first class United States mail.

Scott M. DuBoff
Wright & Talisman, P.C.
1200 G. Street, N.W.
Suite 600
Washington, D.C. 20005-3802

Elizabeth E. Mack
Locke Lidell, & Sapp, L.L.C.
2200 Ross Avenue
Suite 2200
Dallas, Texas 75201-6776

Thomas H. Chiacchio, Jr.
Blank Rome Comisky & McCauley, LLP
One Logan Square
Philadelphia, Pennsylvania 19103-6998

With a courtesy copy to:

John D. Fognani
Lauren C. Buehler
555 17th Street, 26th Floor
Denver, CO 80202

Date: January 29, 2002

Linda Lutton

Linda Lutton

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Samson Hydrocarbons Company, Petitioner, v. United States Environmental Protection Agency, Respondent.	)	Case Nos. 01-3672 and 01-4304
Murphy Exploration & Production Company, Petitioner, v. United States Environmental Protection Agency, Respondent.	)	Case No. 01-3936

EPA'S NOTICE OF FILING REGARDING JURISDICTIONAL ISSUE IN TENTH CIRCUIT, AND NOTICE OF MISTAKEN STATEMENT IN EPA'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO TRANSFER

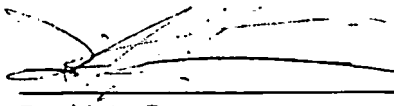
EPA has moved to transfer these cases to the Tenth Circuit and petitioners have opposed the motion. One of the bases for EPA's motion to transfer is that the Marathon Oil Company has filed a petition in the Tenth Circuit challenging the same order challenged by Petitioners here. In their opposition to EPA's motion to transfer, Petitioners noted that after EPA filed its motion, the Tenth Circuit had requested the parties to the Marathon case to address the issue of whether the Tenth Circuit had jurisdiction over Marathon's petition when it was filed 46-days after the October 3, 2001, amended EPA order that it challenges. In its reply memorandum in support of

its motion to transfer, EPA stated that EPA intended to inform the Tenth Circuit that Marathon's petition was timely filed under EPA's regulations. EPA's Reply Memorandum in Support of Motion to Transfer ("EPA's Reply") at 3-4. EPA has now so informed the Tenth Circuit, and a copy of EPA's memorandum to that court is attached hereto for the Court's information.

In addition, EPA would like to inform the Court of a misstatement in its reply memorandum. EPA there stated that "EPA has likewise filed its certified list, which is the same for the Marathon, Murphy and Samson petitions, in the Tenth Circuit." EPA's Reply at 2 n.1. This statement was incorrect because at the time EPA filed its reply memorandum, EPA had not yet filed its certified list in the Tenth Circuit. At the time he filed EPA's reply memorandum, EPA's undersigned counsel, who authored and signed EPA's reply memorandum, was under the mistaken belief that he had, in fact, filed the certified list with the Tenth Circuit at the same time he filed the certified list with this Court for the Murphy petition in early December. However, on January 23, he received a copy of a letter from the Tenth Circuit's Clerk's Office stating that the record on appeal had not been filed. The undersigned apologizes for any confusion his mistake may have caused. EPA filed its certified list for the Marathon case in the Tenth Circuit on January 24, and it is the same certified list that EPA has filed in this Court for the Samson and Murphy cases. Thus, while the above-quoted statement was not entirely correct when it was made, it is correct now.

Respectfully submitted,

THOMAS L. SANSONETTI
Assistant Attorney General
Environment & Natural Resources Division



David A. Carson
U.S. Department of Justice
Environment and Natural Resources Division
Suite 945 - North Tower, 999 18th Street
Denver, Colorado 80202
(303) 312-7309

Date: January 29, 2002

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Marathon Oil Company,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 01-9543
	)	
United States Environmental Protection Agency,	)	
	)	
Respondent.	)	
	)	

EPA'S MEMORANDUM ON JURISDICTION

INTRODUCTION

By letter dated December 21, 2001, the Court directed the parties to file memorandum briefs addressing the following jurisdictional issue:

> Whether this court has jurisdiction where the petition for review was filed on November 20, 2001, 46 days after the date of the order to be reviewed.

The Court specifically directed that the parties' memoranda should address the above-stated issue only. For the reasons stated below, Respondent United States Environmental Protection Agency ("EPA") believes the petition was timely filed and that the Court has jurisdiction to consider the petition for review.

BACKGROUND

A. Factual and Procedural Background.

On September 20, 2001, EPA issued an Emergency Administrative Order under the authority of section 1431 of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §300i, to the

Marathon Oil Company ("Marathon") and several other petroleum companies who are operating or have operated in the East Poplar Oil Field, located on the Fort Peck Indian Reservation, in northern Montana. The Companies expressed concern over certain deadlines in the September 20, 2001 order, and EPA amended and re-issued its order on October 3, 2001.[1]

Petitioner Marathon Oil Company ("Marathon") filed a petition in this Court on November 20, 2001, seeking review of EPA's October 3, 2001, Amended Order.[2]

B. Statutory and Regulatory Background.

Judicial review of EPA orders under the SDWA is governed by section 1448 of the Act, 42 U.S.C. §300j-7(a), which provides, in pertinent part, as follows:

> A petition for review of
>
> . . .
>
> (2) any other final action of the Administrator under this chapter may be filed in the circuit in which the

---

[1] The order requires the Companies to deliver adequate drinking water for a minimum of five years to replace contaminated ground water serving certain reservation home sites. It also requires the Companies to identify and monitor a contamination plume and assess any threat to public water supplies of the City of Poplar. The Companies are also required to provide EPA with records of ground water monitoring and other activities.

[2] Two other companies, Samson Hydrocarbons Company and Murphy Exploration and Production Company, have challenged EPA's September 20, 2001, Order and its October 3, 2001 Amended Order in the United States Court of Appeals for the Third Circuit. Samson Hydrocarbons Co. v. EPA, Nos. 01-3672 and 01-4304 (3rd Cir.) (consolidated); Murphy Exploration & Production Company v. EPA, No. 01-3936 (3rd Cir.). In addition, Samson Hydrocarbons Company and Samson Investment Company have challenged a previous and related EPA SDWA administrative order concerning the groundwater contamination on the Fort Peck Reservation in this Court. Samson Hydrocarbons Co. v. EPA, No. 01-9500 (10th Cir.). That case has been in this Court's mediation program since it was filed, and by order dated December 14, 2001, the case is held in abeyance until September 6, 2002. EPA has moved to transfer the Third Circuit petitions to this Court. Petitioners in those cases have opposed the motion to transfer, which has not yet been ruled upon by the Third Circuit.

> petitioner resides or transacts business which is directly affected by the action.
>
> Any such petition shall be filed within the 45-day period beginning on the date of . . . [the] final Agency action with respect to which review is sought or on the date of the determination with respect to which review is sought, and may be filed after the expiration of such 45-day period if the petition is based solely on grounds arising after the expiration of such period.

42 U.S.C. 300j-7(a)(2).

EPA has promulgated regulations concerning the timing of its actions for purposes of judicial review under 42 U.S.C. § 300j-7(a)(2). Those regulations are codified at 40 C.F.R. § 23.7. EPA's regulations provide, in pertinent part, as follows:

> Unless the Administrator otherwise explicitly provides in a particular promulgation action or determination, the time and date of the Administrator's promulgation, issuance, or determination for purposes of section 1448(a)(2) shall be at 1:00 p.m eastern time (standard or daylight, as appropriate), on the date that is . . . for any . . . document, two weeks after it is signed.

40 C.F.R. § 23.7. Therefore, under EPA's regulation as it relates to administrative orders reviewable under 42 U.S.C. § 300j-7(a)(2), the date of final Agency action for purposes of judicial review is at 1:00 p.m. eastern time, two weeks after the date an order is signed, unless the order explicitly provides to the contrary.

ARGUMENT

Marathon's Petition Challenging EPA's October 3, 2001, Administrative Order Was Timely Filed Under EPA's Regulations.

As this Court has held, the time limit for filing a petition for review under 42 U.S.C. §

300j-7(a) is jurisdictional in nature. HRI, Inc. v. EPA, 198 F.3d 1224, 1235 (10th Cir. 2000).[3] More recently, the District of Columbia Circuit construed a substantially similar provision in the Clean Water Act and held that Rule 26(a) of the Federal Rules of Appellate Procedure does not apply "when Congress has specified a particular method of counting in the statute itself and there is no indication of a contrary congressional intention." Slinger Drainage, Inc. v. EPA, 237 F.3d 681, 683 (D.C.Cir.), cert. denied, 122 S.Ct. 394 (2001). Thus, where as here, Congress has specifically provided that a petition must be filed "within the 45-day period beginning on the date of . . . [the] final Agency action with respect to which review is sought" the 45-day period begins to run on the date of the final agency action, and not on the next day as it would under Rule 26(a) of the Federal Rules of Appellate Procedure. See id.

This does not mean that EPA cannot, as it has done here, promulgate a regulation that defines when its actions become final agency actions for purposes of judicial review. EPA has not changed the method of accounting specified by Congress, rather it has only exercised its discretion to define when its own actions become final agency actions. Thus, EPA's regulations are consistent with the SDWA's judicial review provision. EPA promulgated its regulations in an attempt to prevent the race to the courthouse that often occurs when EPA takes an action affecting more than one party and where original jurisdiction to review the action may potentially lie in more than one court of appeals. See 50 Fed. Reg. 7,268 (Feb. 21, 1985) (final rule); 49 Fed. Reg. 23,152 (Jun. 4, 1984) (proposed rule). In its proposed rule, EPA explained that races to the courthouse often involve elaborate schemes to be the first to file and waste EPA's resources in

[3] EPA's regulations at 40 C.F.R. § 23.7 were not at issue in that case and were not construed by the Court.

responding to the racers' continual requests for information on the status of pending actions. 49 Fed. Reg. at 23,152-53. EPA further explained its belief that races to the courthouse are unfair to litigants with less financial resources, and that they are also undignified parodies of the legal process with which EPA does not wish to be associated. Id. at 23,153. Based upon similar sentiments, the District of Columbia Circuit long ago encouraged federal agencies to promulgate regulations that discourage such races:

> If the federal administrative agencies would promulgate straightforward regulations explaining how and when their reviewable orders are to issue, protracted procedural disputes born of the desire to win the race to the courthouse would largely be consigned to an early grave.

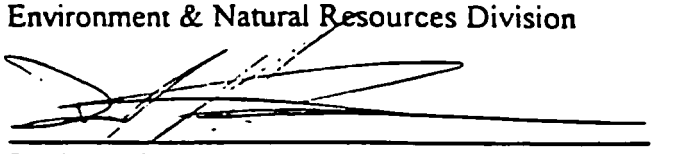
International Union of Electrical, Radio and Machine Workers v. NLRB, 610 F.2d 956, 964 (D.C. Cir. 1979). Therefore, EPA's regulations are not only consistent with the SDWA's judicial review provision, they also serve the legitimate purpose of diminishing the prospect of a race to the courthouse by defining when EPA's actions become final for purposes of judicial review in a manner that seeks to place all affected parties on equal footing.

Reading EPA's regulations at 40 C.F.R. § 23.7 together with the court's decision in Slinger Drainage, the 45-day period for seeking review of a SDWA administrative order such as the one at issue here, begins precisely at 1:00 p.m. eastern time, two weeks after the date the order was signed, unless the order explicitly provides to the contrary. In this case, EPA's Amended Order was signed on October 3, 2001, and it did not explicitly provide that it would be considered a final agency action at any time other than two weeks later as provided for in EPA's

regulations.[4] Thus, under EPA's regulation, the Amended Order became a final agency action for purposes of judicial review on October 17, 2001. Marathon would have had until November 30, 2001, within which to file its petition under 42 U.S.C. § 300j-7(a)(2). Marathon filed its petition on November 20, 2001. Therefore, Marathon's petition challenging EPA's October 30, 2001 Amended Order was timely filed, and this Court has jurisdiction over the petition.[5]

Respectfully Submitted,

THOMAS L. SANSONETTI
Assistant Attorney General
Environment & Natural Resources Division



David A. Carson
U.S. Department of Justice
Environment and Natural Resources Division
Suite 945 - North Tower, 999 18th Street
Denver, Colorado 80202
(303) 312-7309

Of Counsel:

Richard Witt
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

---

[4] The order, by its own terms, became effective for the purpose of computing time for compliance with certain of the order's requirements, three working days later, on October 9, 2001. However, the compliance deadlines are different than, and irrelevant to, the 45-day window for seeking judicial review of the order.

[5] Because the Court explicitly limited the question to be addressed in this memorandum to whether the Court has jurisdiction to hear Marathon's challenge to EPA's October 3, 2001, Amended Order, we do not here address any issues relating to the scope or merits of Marathon's petition.

Steven B. Moores
Associate Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
Denver, Colorado 80202

James Eppers
Senior Enforcement Attorney
Legal Enforcement Program
U.S. Environmental Protection Agency
Denver, Colorado 80202

Date: January 22, 2002

CERTIFICATE OF SERVICE

It is hereby certified that on this date the undersigned caused a true and correct copy of the foregoing EPA's Memorandum on Jurisdiction to be mailed to the following counsel of record by first class United States mail:

John D. Fognani
Lauren C. Buehler
555 17th Street, 26th Floor
Denver, CO 80202

With courtesy copies to the following:

Scott M. DuBoff
Wright & Talisman, P.C.
1200 G. Street, N.W.
Suite 600
Washington, D.C. 20005-3802

Elizabeth E. Mack
Locke Lidell, & Sapp, L.L.C.
2200 Ross Avenue
Suite 2200
Dallas, Texas 75201-6776

Thomas H. Chiacchio, Jr.
Blank Rome Comisky & McCauley, LLP
One Logan Square
Philadelphia, Pennsylvania 19103-6998

Date: January 22, 2002

Linda Lutton

Linda Lutton

CERTIFICATE OF SERVICE

It is hereby certified that on this date the undersigned caused a true and correct copy of the foregoing EPA's Notice of Filing Regarding Jurisdictional Issue in Tenth Circuit, and Notice of Mistaken Statement in EPA's Reply Memorandum in Support of Motion to Transfer to be mailed to the following counsel by first class United States mail.

Scott M. DuBoff
Wright & Talisman, P.C.
1200 G. Street, N.W.
Suite 600
Washington, D.C. 20005-3802

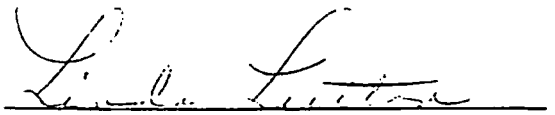
Elizabeth E. Mack
Locke Lidell, & Sapp, L.L.C.
2200 Ross Avenue
Suite 2200
Dallas, Texas 75201-6776

Thomas H. Chiacchio, Jr.
Blank Rome Comisky & McCauley, LLP
One Logan Square
Philadelphia, Pennsylvania 19103-6998

With a courtesy copy to:

John D. Fognani
Lauren C. Buehler
555 17th Street, 26th Floor
Denver, CO 80202

Date: January 29, 2002



Linda Lutton

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Samson Hydrocarbons Company, Petitioner, v. United States Environmental Protection Agency, Respondent.	)	Case Nos. 01-3672 and 01-4304
Murphy Exploration & Production Company, Petitioner, v. United States Environmental Protection Agency, Respondent.	)	Case No. 01-3936

EPA'S NOTICE OF FILING REGARDING JURISDICTIONAL ISSUE IN TENTH CIRCUIT, AND NOTICE OF MISTAKEN STATEMENT IN EPA'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO TRANSFER

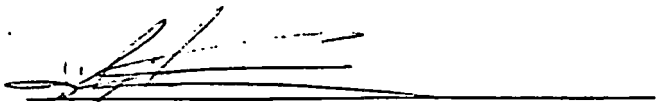
EPA has moved to transfer these cases to the Tenth Circuit and petitioners have opposed the motion. One of the bases for EPA's motion to transfer is that the Marathon Oil Company has filed a petition in the Tenth Circuit challenging the same order challenged by Petitioners here. In their opposition to EPA's motion to transfer, Petitioners noted that after EPA filed its motion, the Tenth Circuit had requested the parties to the Marathon case to address the issue of whether the Tenth Circuit had jurisdiction over Marathon's petition when it was filed 46-days after the October 3, 2001, amended EPA order that it challenges. In its reply memorandum in support of

its motion to transfer. EPA stated that EPA intended to inform the Tenth Circuit that Marathon's petition was timely filed under EPA's regulations. EPA's Reply Memorandum in Support of Motion to Transfer ("EPA's Reply") at 3-4. EPA has now so informed the Tenth Circuit, and a copy of EPA's memorandum to that court is attached hereto for the Court's information.

In addition, EPA would like to inform the Court of a misstatement in its reply memorandum. EPA there stated that "EPA has likewise filed its certified list, which is the same for the Marathon, Murphy and Samson petitions, in the Tenth Circuit." EPA's Reply at 2 n.1. This statement was incorrect because at the time EPA filed its reply memorandum, EPA had not yet filed its certified list in the Tenth Circuit. At the time he filed EPA's reply memorandum, EPA's undersigned counsel, who authored and signed EPA's reply memorandum, was under the mistaken belief that he had, in fact, filed the certified list with the Tenth Circuit at the same time he filed the certified list with this Court for the Murphy petition in early December. However, on January 23, he received a copy of a letter from the Tenth Circuit's Clerk's Office stating that the record on appeal had not been filed. The undersigned apologizes for any confusion his mistake may have caused. EPA filed its certified list for the Marathon case in the Tenth Circuit on January 24, and it is the same certified list that EPA has filed in this Court for the Samson and Murphy cases. Thus, while the above-quoted statement was not entirely correct when it was made, it is correct now.

Respectfully submitted,

THOMAS L. SANSONETTI
Assistant Attorney General
Environment & Natural Resources Division



David A. Carson
U.S. Department of Justice
Environment and Natural Resources Division
Suite 945 - North Tower, 999 18th Street
Denver, Colorado 80202
(303) 312-7309

Date: January 29, 2002

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Marathon Oil Company,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 01-9543
	)	
United States Environmental Protection Agency,	)	
	)	
Respondent.	)	
	)	

EPA'S MEMORANDUM ON JURISDICTION

INTRODUCTION

By letter dated December 21, 2001, the Court directed the parties to file memorandum briefs addressing the following jurisdictional issue:

> Whether this court has jurisdiction where the petition for review was filed on November 20, 2001, 46 days after the date of the order to be reviewed.

The Court specifically directed that the parties' memoranda should address the above-stated issue only. For the reasons stated below, Respondent United States Environmental Protection Agency ("EPA") believes the petition was timely filed and that the Court has jurisdiction to consider the petition for review.

BACKGROUND

A. Factual and Procedural Background.

On September 20, 2001, EPA issued an Emergency Administrative Order under the authority of section 1431 of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §300i, to the

Marathon Oil Company ("Marathon") and several other petroleum companies who are operating or have operated in the East Poplar Oil Field, located on the Fort Peck Indian Reservation, in northern Montana. The Companies expressed concern over certain deadlines in the September 20, 2001 order, and EPA amended and re-issued its order on October 3, 2001.[1]

Petitioner Marathon Oil Company ("Marathon") filed a petition in this Court on November 20, 2001, seeking review of EPA's October 3, 2001, Amended Order.[2]

B. Statutory and Regulatory Background.

Judicial review of EPA orders under the SDWA is governed by section 1448 of the Act, 42 U.S.C. §300j-7(a), which provides, in pertinent part, as follows:

> A petition for review of
>
> . . .
>
> (2) any other final action of the Administrator under this chapter may be filed in the circuit in which the

---

[1] The order requires the Companies to deliver adequate drinking water for a minimum of five years to replace contaminated ground water serving certain reservation home sites. It also requires the Companies to identify and monitor a contamination plume and assess any threat to public water supplies of the City of Poplar. The Companies are also required to provide EPA with records of ground water monitoring and other activities.

[2] Two other companies, Samson Hydrocarbons Company and Murphy Exploration and Production Company, have challenged EPA's September 20, 2001, Order and its October 3, 2001 Amended Order in the United States Court of Appeals for the Third Circuit. Samson Hydrocarbons Co. v. EPA, Nos. 01-3672 and 01-4304 (3rd Cir.) (consolidated); Murphy Exploration & Production Company v. EPA, No. 01-3936 (3rd Cir.). In addition, Samson Hydrocarbons Company and Samson Investment Company have challenged a previous and related EPA SDWA administrative order concerning the groundwater contamination on the Fort Peck Reservation in this Court. Samson Hydrocarbons Co. v. EPA, No. 01-9500 (10th Cir.). That case has been in this Court's mediation program since it was filed, and by order dated December 14, 2001, the case is held in abeyance until September 6, 2002. EPA has moved to transfer the Third Circuit petitions to this Court. Petitioners in those cases have opposed the motion to transfer, which has not yet been ruled upon by the Third Circuit.

> petitioner resides or transacts business which is directly affected by the action.
>
> Any such petition shall be filed within the 45-day period beginning on the date of . . . [the] final Agency action with respect to which review is sought or on the date of the determination with respect to which review is sought, and may be filed after the expiration of such 45-day period if the petition is based solely on grounds arising after the expiration of such period.

42 U.S.C. 300j-7(a)(2).

EPA has promulgated regulations concerning the timing of its actions for purposes of judicial review under 42 U.S.C. § 300j-7(a)(2). Those regulations are codified at 40 C.F.R. § 23.7. EPA's regulations provide, in pertinent part, as follows:

> Unless the Administrator otherwise explicitly provides in a particular promulgation action or determination, the time and date of the Administrator's promulgation, issuance, or determination for purposes of section 1448(a)(2) shall be at 1:00 p.m eastern time (standard or daylight, as appropriate), on the date that is . . . for any . . . document, two weeks after it is signed.

40 C.F.R. § 23.7. Therefore, under EPA's regulation as it relates to administrative orders reviewable under 42 U.S.C. § 300j-7(a)(2), the date of final Agency action for purposes of judicial review is at 1:00 p.m. eastern time, two weeks after the date an order is signed, unless the order explicitly provides to the contrary.

ARGUMENT

Marathon's Petition Challenging EPA's October 3, 2001, Administrative Order Was Timely Filed Under EPA's Regulations.

As this Court has held, the time limit for filing a petition for review under 42 U.S.C. §

300j-7(a) is jurisdictional in nature. HRI, Inc. v. EPA, 198 F.3d 1224, 1235 (10th Cir. 2000).[3] More recently, the District of Columbia Circuit construed a substantially similar provision in the Clean Water Act and held that Rule 26(a) of the Federal Rules of Appellate Procedure does not apply "when Congress has specified a particular method of counting in the statute itself and there is no indication of a contrary congressional intention." Slinger Drainage, Inc. v. EPA, 237 F.3d 681, 683 (D.C.Cir.), cert. denied, 122 S.Ct. 394 (2001). Thus, where as here, Congress has specifically provided that a petition must be filed "within the 45-day period beginning on the date of . . . [the] final Agency action with respect to which review is sought" the 45-day period begins to run on the date of the final agency action, and not on the next day as it would under Rule 26(a) of the Federal Rules of Appellate Procedure. See id.

This does not mean that EPA cannot, as it has done here, promulgate a regulation that defines when its actions become final agency actions for purposes of judicial review. EPA has not changed the method of accounting specified by Congress, rather it has only exercised its discretion to define when its own actions become final agency actions. Thus, EPA's regulations are consistent with the SDWA's judicial review provision. EPA promulgated its regulations in an attempt to prevent the race to the courthouse that often occurs when EPA takes an action affecting more than one party and where original jurisdiction to review the action may potentially lie in more than one court of appeals. See 50 Fed. Reg. 7,268 (Feb. 21, 1985) (final rule); 49 Fed. Reg. 23,152 (Jun. 4, 1984) (proposed rule). In its proposed rule, EPA explained that races to the courthouse often involve elaborate schemes to be the first to file and waste EPA's resources in

[3] EPA's regulations at 40 C.F.R. § 23.7 were not at issue in that case and were not construed by the Court.

responding to the racers' continual requests for information on the status of pending actions. 49 Fed. Reg. at 23,152-53. EPA further explained its belief that races to the courthouse are unfair to litigants with less financial resources, and that they are also undignified parodies of the legal process with which EPA does not wish to be associated. Id. at 23,153. Based upon similar sentiments, the District of Columbia Circuit long ago encouraged federal agencies to promulgate regulations that discourage such races:

> If the federal administrative agencies would promulgate straightforward regulations explaining how and when their reviewable orders are to issue, protracted procedural disputes born of the desire to win the race to the courthouse would largely be consigned to an early grave.

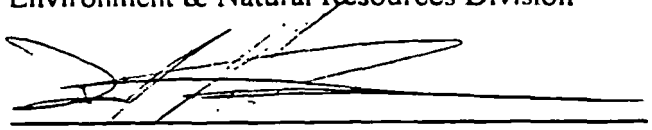
International Union of Electrical, Radio and Machine Workers v. NLRB, 610 F.2d 956, 964 (D.C. Cir. 1979). Therefore, EPA's regulations are not only consistent with the SDWA's judicial review provision, they also serve the legitimate purpose of diminishing the prospect of a race to the courthouse by defining when EPA's actions become final for purposes of judicial review in a manner that seeks to place all affected parties on equal footing.

Reading EPA's regulations at 40 C.F.R. § 23.7 together with the court's decision in Slinger Drainage, the 45-day period for seeking review of a SDWA administrative order such as the one at issue here, begins precisely at 1:00 p.m. eastern time, two weeks after the date the order was signed, unless the order explicitly provides to the contrary. In this case, EPA's Amended Order was signed on October 3, 2001, and it did not explicitly provide that it would be considered a final agency action at any time other than two weeks later as provided for in EPA's

regulations.[4] Thus, under EPA's regulation, the Amended Order became a final agency action for purposes of judicial review on October 17, 2001. Marathon would have had until November 30, 2001, within which to file its petition under 42 U.S.C. § 300j-7(a)(2). Marathon filed its petition on November 20, 2001. Therefore, Marathon's petition challenging EPA's October 30, 2001 Amended Order was timely filed, and this Court has jurisdiction over the petition.[5]

Respectfully Submitted,

THOMAS L. SANSONETTI
Assistant Attorney General
Environment & Natural Resources Division



David A. Carson
U.S. Department of Justice
Environment and Natural Resources Division
Suite 945 - North Tower, 999 18th Street
Denver, Colorado 80202
(303) 312-7309

Of Counsel:

Richard Witt
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

---

[4] The order, by its own terms, became effective for the purpose of computing time for compliance with certain of the order's requirements, three working days later, on October 9, 2001. However, the compliance deadlines are different than, and irrelevant to, the 45-day window for seeking judicial review of the order.

[5] Because the Court explicitly limited the question to be addressed in this memorandum to whether the Court has jurisdiction to hear Marathon's challenge to EPA's October 3, 2001, Amended Order, we do not here address any issues relating to the scope or merits of Marathon's petition.

Steven B. Moores
Associate Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
Denver, Colorado 80202

James Eppers
Senior Enforcement Attorney
Legal Enforcement Program
U.S. Environmental Protection Agency
Denver, Colorado 80202

Date: January 22, 2002

CERTIFICATE OF SERVICE

It is hereby certified that on this date the undersigned caused a true and correct copy of the foregoing EPA's Memorandum on Jurisdiction to be mailed to the following counsel of record by first class United States mail:

John D. Fognani
Lauren C. Buehler
555 17th Street, 26th Floor
Denver, CO 80202

With courtesy copies to the following:

Scott M. DuBoff
Wright & Talisman, P.C.
1200 G. Street, N.W.
Suite 600
Washington, D.C. 20005-3802

Elizabeth E. Mack
Locke Lidell, & Sapp, L.L.C.
2200 Ross Avenue
Suite 2200
Dallas, Texas 75201-6776

Thomas H. Chiacchio, Jr.
Blank Rome Comisky & McCauley, LLP
One Logan Square
Philadelphia, Pennsylvania 19103-6998

Date: January 22, 2002

Linda Lutton

Linda Lutton

CERTIFICATE OF SERVICE

It is hereby certified that on this date the undersigned caused a true and correct copy of the foregoing EPA's Notice of Filing Regarding Jurisdictional Issue in Tenth Circuit, and Notice of Mistaken Statement in EPA's Reply Memorandum in Support of Motion to Transfer to be mailed to the following counsel by first class United States mail.

Scott M. DuBoff
Wright & Talisman, P.C.
1200 G. Street, N.W.
Suite 600
Washington, D.C. 20005-3802

Elizabeth E. Mack
Locke Lidell, & Sapp, L.L.C.
2200 Ross Avenue
Suite 2200
Dallas, Texas 75201-6776

Thomas H. Chiacchio, Jr.
Blank Rome Comisky & McCauley, LLP
One Logan Square
Philadelphia, Pennsylvania 19103-6998

With a courtesy copy to:

John D. Fognani
Lauren C. Buehler
555 17th Street, 26th Floor
Denver, CO 80202

Date: January 29, 2002

Linda Lutton

Linda Lutton

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MARATHON OIL COMPANY,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

No. 01-9543

ORDER

Filed February 19, 2002

Before **MURPHY** and **PORFILIO**, Circuit Judges.

The petitioner's motion to transfer is **GRANTED**. This matter is transferred to the United States Court of Appeals for the Third Circuit.

Entered for the Court
PATRICK FISHER, Clerk of Court

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
Office of the Clerk
Byron White United States Courthouse
Denver, Colorado 80257
(303) 844-3157

Patrick J. Fisher, Jr.
Clerk of Court

Jane B. Howell
Chief Deputy Clerk

February 19, 2002

United States Court of Appeals
for the Third Circuit
Ms. Marcia M. Waldron, Clerk
21400 U.S. Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106-1790

Re: 01-9543; Marathon Oil v. EPA

Dear Ms. Waldron:

Enclosed is a certified copy of the order entered by this Court transferring the above appeal to the United States Court of Appeals for the Third Circuit.

Accordingly, we are enclosing copies of this Court's docket entries, pleadings filed in this court and, if any, additional documents that were received after the transfer order went into effect. We ask that you acknowledge receipt of these documents by signing the enclosed copy of this letter and returning it to us.

Please call this office if you have any further questions.

Sincerely,

By:
Deputy Clerk

cc:
John D. Fognani

Lauren C. Buehler
General Counsel
Jim Eppers
David A. Carson

JAN 2 8 2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARATHON OIL COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 01-9543
	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	
	)	

NOTICE OF TRANSFER PURSUANT TO 28 U.S.C. § 2112

1. This notice is to advise the Court that Samson Hydrocarbons Company ("Samson") and Murphy Exploration & Production Company ("Murphy") have filed Petitions for Review in the United States Court of Appeals for the Third Circuit concerning the same Order at issue in this case.

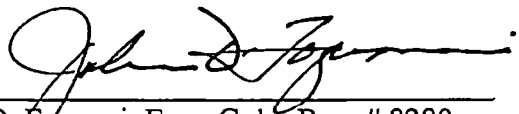
2. Marathon Oil Company ("Marathon") filed its Petition for Review in this Court pursuant to Section 1448 of the Safe Drinking Water Act, which states that a Petition for Review may be filed in either the Circuit in which the petitioner resides or where the petitioner transacts business which is directly affected by the action. 42 U.S.C. § 300j-7. Marathon resides within the State of Colorado, and therefore, filed its Petition for Review with the Tenth Circuit. Marathon was not entitled to file its Petition for Review in the Third Circuit, as it is not a resident within that Circuit, nor is the directly affected Marathon business activity conducted within that Circuit.

3. The Petitions for Review filed by Samson and Murphy pre-dated the Petition for Review filed by Marathon on November 20, 2001.

4. Thus, assuming that this Court finds that Marathon's Petition for Review was timely filed and that this Court therefore has jurisdiction, this proceeding must be transferred to the Third Circuit pursuant to 28 U.S.C. § 2112(a)(5).

Dated: January 25, 2002

Respectfully submitted,



John D. Fognani, Esq., Colo. Reg. # 8280
Lauren C. Buehler, Esq., Colo. Reg. # 29286
FOGNANI GUILBORD HOMSY & ROBERTS, LLP
555 – 17th Street, 26th Floor
Denver, CO 80202
Telephone: (303) 382-6200
Facsimile: (303) 382-6210

ATTORNEYS FOR MARATHON OIL COMPANY

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of January 2002, a true and correct copy of the foregoing **NOTICE OF TRANSFER PURSUANT TO 28 U.S.C. § 2112** was served via first-class mail, postage prepaid, upon the following:

Elizabeth E. Mack, Esq.
Locke Liddell & Sapp LLP
2200 Ross Avenue, Suite 2200
Dallas, TX 75201-6776

Steve Leifer, Esq.
Baker & Botts LLP
The Warner
1299 Pennsylvania Ave., N.W.
Washington, DC 20004-2400

James E. Baine, Esq.
Murphy Exploration & Production Co.
200 Peach Street
El Dorado, AK 71730

Thomas H. Chiacchio, Jr., Esq.
Blank Rome Comisky & McCauley, LLP
One Logan Square
Philadelphia, PA 19103-6998

David A. Carson, Esq.
United States Department of Justice
Environment and Natural Resources Div.
999 – 18th Street, North Tower, Suite 945
Denver, CO 80202

Jim Eppers, Esq.
U.S. Environmental Protection Agency
Region 8
999 – 18th Street, Suite 300
Denver, CO 80202-2466

Scott M. DuBoff, Esq.
Wright & Talisman, P.C.
1200 "G" Street, N.W.
Suite 600
Washington, DC 20005-3802

Barbara E. Hauk

U.S. Department of Justice

Environment and Natural Resources Division

LJG:DAC

David A. Carson
Environmental Defense Section
999 18th Street
Suite 945 North Tower
Denver, CO 80202

Telephone (303) 312-7309
Facsimile (303) 312-7331

January 14, 2002

via federal express

Marcia M. Waldron, Clerk
21400 United States Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106-1790
Attn: Lynn Caswell Lopez

Re: Samson Hydrocarbons Co. v. EPA, Nos. 01-3672 & 01-4304 (3rd Cir.); Murphy Exploration and Production Co. v. EPA, No. 01-3936

Dear Ms. Lopez:

Enclosed please find two originals and six copies of a Reply Memorandum in Support of EPA's Motion to Transfer in these cases. There is one original and three copies for each case. Copies have been served in accordance with the attached Certificates of Service.

Please do not hesitate to call me at (303)312-7309 if you have any questions.

Sincerely,

David A. Carson, Senior Trial Counsel
Environmental Defense Section

enclosure

cc: James Eppers
Steven Moores
Nathan Wiser
Richard Witt

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Samson Hydrocarbons Company, Petitioner, v. United States Environmental Protection Agency, Respondent.	)	Case Nos. 01-3672 and 01-4304
Murphy Exploration & Production Company, Petitioner, v. United States Environmental Protection Agency, Respondent.	)	Case No. 01-3936

EPA'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO TRANSFER

EPA has moved to transfer these cases to the Tenth Circuit, where Samson previously filed a petition for review of an earlier EPA administrative order that is closely related to the one challenged here and addresses the same environmental contamination, albeit with different requirements. That appeal is still pending. The Marathon Oil Company ("Marathon"), has also filed a petition in the Tenth Circuit challenging the very same order challenged here. Marathon Oil Co. v. EPA, No. 01-9543 (10th Cir.). Petitioners Samson and Murphy have filed a joint response in opposition to EPA's motion to transfer. As is shown below, Samson and Murphy's arguments lack merit, and the Court should grant EPA's motion to transfer.

ARGUMENT

A. The Court Has Discretion to Transfer These Petitions to The Tenth Circuit.

Samson and Murphy take a wooden approach to 28 U.S.C. § 2111(a)(5), arguing that this Court lacks the authority to transfer these petitions to the Tenth Circuit at this time. According to Petitioners, the Marathon case pending in the Tenth Circuit must first be transferred to this Court because EPA has filed the certified index to its administrative record in this Court.[1] Samson and Murphy assert that this Court may only transfer the cases filed here to the Tenth Circuit after it receives Marathon from the Tenth Circuit. Then the Court would have the discretion to transfer all the cases, including Marathon, back to the Tenth Circuit. It is hard to believe that Congress intended such an overly mechanistic approach, with its attendant waste of resources, to the orderly determination of which of two Courts of Appeals should hear several challenges to one administrative order. However, even if Congress did so intend, nothing in 28 U.S.C. § 2112(a)(5), provides that this Court lacks the discretion to determine at this time that it will transfer these cases to the Tenth Circuit for the convenience of the parties and in the interest of justice.[2] If, after the Court makes this determination, EPA needs to effect a transfer of the

---

[1] EPA has likewise filed its certified list, which is the same for the Marathon, Murphy and Samson petitions, in the Tenth Circuit.

[2] 28 U.S.C. § 2112(a)(5) provides as follows:

> All courts in which proceedings are instituted with respect to the same order, other than the court in which the record is filed pursuant to this subsection, shall transfer those proceedings to the court in which the record is so filed. For the convenience of the parties in the interest of justice, the court in which the record is filed may thereafter transfer all of the proceedings with respect to that order to any other court of appeals.

Marathon case to this Court so it may then transfer it back to the Tenth Circuit along with these cases, then this can easily be achieved.[y] Accordingly, if the Court determines that the Marathon case must first be transferred here, then it should at this time determine that it will thereafter transfer these cases and Marathon to the Tenth Circuit.

B. Convenience Favors a Transfer to the Tenth Circuit.

Marathon and Murphy also offer several faulty arguments in support of their contention that it will be more convenient for these cases to be heard in this Court, even though counsel for two of the four parties are located in Denver and another is located in Dallas, which is obviously closer to Denver than to Philadelphia.

Samson and Murphy first argue that the pendency of Marathon's petition in the Tenth Circuit makes no difference because that court has requested Marathon and EPA to address the question of whether it lacks jurisdiction because Marathon's petition was filed 46 days after EPA's October 3, 2001 administrative order. Samson/Murphy Opp. at 5. EPA intends to inform the Tenth Circuit that Marathon's challenge to EPA's October 3, 2001 administrative order was

---

28 U.S.C. § 2112(a)(5).

[y] Marathon has not asked the Tenth Circuit to transfer its petition to this Court, and its counsel has informed EPA's counsel that the Tenth Circuit is obviously a more convenient forum for its purposes than is this Court. EPA agrees with Samson and Murphy only to this extent: because the Samson case was filed in this Court before Marathon was filed in the Tenth Circuit, only this Court has the discretionary authority under the second sentence of 28 U.S.C. § 2112(a)(5) to order transfer of any of the cases "for the convenience of the parties in the interest of justice." If this Court elects not to grant EPA's transfer motion, the Tenth Circuit would be required under the first sentence of § 2112(a)(5) to transfer Marathon to this Court. We do not agree, however, that the Tenth Circuit's ministerial action must precede this Court's discretionary decision.

timely filed under EPA's regulations.[4] That being the case, it is highly doubtful that the Tenth Circuit will find that it lacks jurisdiction over Marathon's petition due to a timeliness defect. Accordingly, the pendency of the Marathon petition in the Tenth Circuit is a significant factor in determining whether these cases should be transferred to that court.

Samson and Murphy also argue that Marathon's petition should not be taken into account because that petition challenges only the October 3, 2001 amended administrative order and not the September 20, 2001 administrative order that preceded it. Thus, according to Samson and Murphy, Marathon is limited to challenging EPA's decisions to extend certain deadlines in the September 20 order at the companies' request, and to remove Samson Investment Company as a respondent to the order at Samson's request. Samson/Murphy Opp. at 5-6. While EPA takes no position at this time on the merits of this argument as it may affect Marathon's petition, it is not at all persuasive with respect to EPA's motion to transfer. It is a certainty that Marathon will oppose any attempt to so limit its challenge to EPA's order. And it is likely that the scope of Marathon's petition will have to be determined when the parties brief the merits of that petition. Accordingly, Samson and Murphy are off-base in their assertion that these cases should not be transferred to the Tenth Circuit because Marathon's petition is more limited in scope than are their petitions.

Samson and Murphy next argue that it is their choice of forum that is controlling.

---

[4] 42 U.S.C. § 300j-7(a)(2) requires that a petition for review, such as the one filed by Marathon, must be filed within 45 days of the date of the final agency action being challenged. EPA's regulation at 40 C.F.R. § 23.7 essentially provides that the time and date of an EPA action for purposes of judicial review under 42 U.S.C. § 300j-7 (a) (2), is two weeks after the date of the relevant order. Marathon's challenge to EPA's October 3, 2001 order was timely filed when EPA's regulation is taken into account.

Samson/Murphy Opp. at 6-7. However, it was Samson who originally chose the Tenth Circuit when challenging the preceding EPA administrative order that is substantially related to the one they challenge here. Samson's first choice should be controlling. Moreover, Congress has provided that the convenience of all the parties should be considered under 28 U.S.C. § 2112(a). Just because Murphy and Samson were able to "choose" the Third Circuit under the Safe Drinking Water Act's venue provision and Marathon was not, does not mean that Samson and Murphy should be able to impose their will on Marathon. Marathon's counsel is located in Denver and the Tenth Circuit is obviously a more convenient forum for Marathon. As previously noted, that court is also clearly more convenient for EPA's Denver-based counsel and for Samson's Dallas-based counsel.[4] Accordingly, Samson and Murphy's choice of forum should not be controlling.

C. Judicial Economy Favors a Transfer to the Tenth Circuit.

Samson and Murphy argue that Samson's own Tenth Circuit petition should not be taken into account because it has been in mediation and may become moot. Samson/Murphy Opp. at 7-8. The order Samson challenges in the Tenth Circuit requires it and the other companies to supply

---

[4] Samson's assertion that Philadelphia is equally as convenient as Denver for its Dallas counsel defies common sense. See Opposition at 7 n.3. Dallas is clearly closer geographically to Denver than it is to Philadelphia. It will obviously take less time for Samson's counsel to travel to Denver for any argument or other proceedings than to Philadelphia. See United Steelworkers of America v. Marshall, 592 F.2d 693,697 (3rd Cir. 1979) ("The only significant convenience factor which affects petitioners seeking review of rulemaking on an agency record is the convenience of counsel who will brief and argue the petitions"). Samson's assertion regarding the convenience of this Court is also belied by the fact that Samson previously filed a petition challenging the preceding and related EPA administrative order in the Tenth Circuit.

bottled water to a number of residences on the Fort Peck Indian Reservation.[9] Among other things, the orders challenged here require the companies to provide a more permanent supply of water. Thus, the only way that Samson's Tenth Circuit petition can become even partially moot is if Samson and the other companies provide the required permanent water source, thereby obviating the need for the bottled water. In that event, these petitions may likewise become moot on the alternative water supply requirement and one court -- the Tenth Circuit where the original Samson petition has long been pending -- should be able to address the mootness issue with respect to all the various petitions.

Moreover, as we previously indicated, the Tenth Circuit mediator is already familiar with the underlying facts surrounding the orders and the concerns of two of the parties. If the companies intend to comply with all of the provisions of the challenged orders -- and EPA currently understands that they do -- then, like Samson's first petition, these cases should be in mediation in the Tenth Circuit until such time as compliance is achieved. Then all these cases can be dismissed as moot.

Samson's contention that it will seek a transfer of its older Tenth Circuit petition to this Court if it is not eventually dismissed as moot by September 2002 wholly misses the mark. It is entirely inconsistent with notions of judicial economy for Samson to file related petitions in two different Courts and then assert that it should be able to unilaterally control when and if one of its challenges should be transferred so that one Court will have both petitions. There is no need to

---

[9] It also requires the companies to provide EPA with certain documents regarding the companies' operations in a defined geographic area within the Fort Peck Reservation. That requirement is a continuing one.

wait until September before all the petitions challenging EPA's administrative orders are transferred to one court. This Court should now transfer these petitions to the Tenth Circuit so that that Court will have all of the related petitions before it.

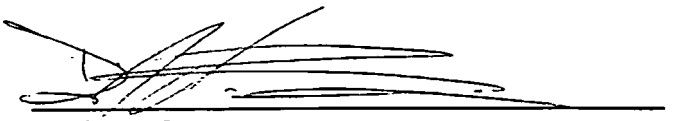
Finally, Samson and Murphy suggest that there would be nothing wrong with having two different courts consider the merits of similar challenges to the same EPA administrative order and issue inconsistent judgments. Samson/Murphy Opp. at 8 n.4. This suggestion requires little response. The waste of judicial resources involved in having two different Courts of Appeals consider a challenge to a single EPA administrative order is alone reason enough for a transfer. Moreover, inconsistent judgments would leave all parties unsure of their rights and obligations and would hamper EPA's ability to address the groundwater contamination associated with the companies' past activities on the Fort Peck Reservation. Perhaps this is what Samson and Murphy have in mind. Regardless of the companies' motivations, it is clear that inconsistent judgments would thwart Congress' intention that EPA should have the ability to address contamination of drinking water in an expeditious manner. Thus, the possibility of inconsistent judgments alone is reason enough for a transfer of these cases to the Tenth Circuit.

CONCLUSION

For all these reasons, as well as those stated in EPA's motion to transfer, the Court should transfer these cases to the Tenth Circuit under 28 U.S.C. § 2112(a)(5).

Respectfully submitted,

THOMAS L. SANSONETTI
Assistant Attorney General
Environment & Natural Resources Division



David A. Carson
U.S. Department of Justice
Environment and Natural Resources Division
Suite 945 - North Tower, 999 18th Street
Denver, Colorado 80202
(303) 312-7309

Of Counsel:

Richard Witt
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Steven B. Moores
Associate Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
Denver, Colorado 80202

James Eppers
Senior Enforcement Attorney
Legal Enforcement Program
U.S. Environmental Protection Agency
Denver, Colorado 80202

Date: January 14, 2002

CERTIFICATE OF SERVICE

It is hereby certified that on this date the undersigned caused a true and correct copy of the foregoing Reply Memorandum in Support of Motion to Transfer to be mailed to the following counsel by first class United States mail.

Scott M. DuBoff
Wright & Talisman, P.C.
1200 G. Street, N.W.
Suite 600
Washington, D.C. 20005-3802

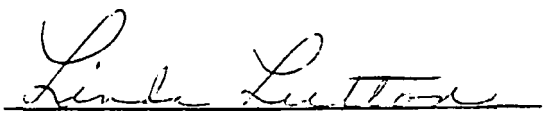
Elizabeth E. Mack
Locke Lidell, & Sapp, L.L.C.
2200 Ross Avenue
Suite 2200
Dallas, Texas 75201-6776

Thomas H. Chiacchio, Jr.
Blank Rome Comisky & McCauley, LLP
One Logan Square
Philadelphia, Pennsylvania 19103-6998

With a courtesy copy to:

John D. Fognani
Lauren C. Buehler
555 17th Street, 26th Floor
Denver, CO 80202

Date: January 14, 2002



Linda Lutton

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Samson Hydrocarbons Company, Petitioner, v. United States Environmental Protection Agency, Respondent.	)	Case Nos. 01-3672 and 01-4304
Murphy Exploration & Production Company, Petitioner, v. United States Environmental Protection Agency, Respondent.	)	Case No. 01-3936

EPA'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO TRANSFER

EPA has moved to transfer these cases to the Tenth Circuit, where Samson previously filed a petition for review of an earlier EPA administrative order that is closely related to the one challenged here and addresses the same environmental contamination, albeit with different requirements. That appeal is still pending. The Marathon Oil Company ("Marathon"), has also filed a petition in the Tenth Circuit challenging the very same order challenged here. Marathon Oil Co. v. EPA, No. 01-9543 (10th Cir.). Petitioners Samson and Murphy have filed a joint response in opposition to EPA's motion to transfer. As is shown below, Samson and Murphy's arguments lack merit, and the Court should grant EPA's motion to transfer.

ARGUMENT

A. The Court Has Discretion to Transfer These Petitions to The Tenth Circuit.

Samson and Murphy take a wooden approach to 28 U.S.C. § 2111(a)(5), arguing that this Court lacks the authority to transfer these petitions to the Tenth Circuit at this time. According to Petitioners, the Marathon case pending in the Tenth Circuit must first be transferred to this Court because EPA has filed the certified index to its administrative record in this Court.[1] Samson and Murphy assert that this Court may only transfer the cases filed here to the Tenth Circuit after it receives Marathon from the Tenth Circuit. Then the Court would have the discretion to transfer all the cases, including Marathon, back to the Tenth Circuit. It is hard to believe that Congress intended such an overly mechanistic approach, with its attendant waste of resources, to the orderly determination of which of two Courts of Appeals should hear several challenges to one administrative order. However, even if Congress did so intend, nothing in 28 U.S.C. § 2112(a)(5), provides that this Court lacks the discretion to determine at this time that it will transfer these cases to the Tenth Circuit for the convenience of the parties and in the interest of justice.[2] If, after the Court makes this determination, EPA needs to effect a transfer of the

---

[1] EPA has likewise filed its certified list, which is the same for the Marathon, Murphy and Samson petitions, in the Tenth Circuit.

[2] 28 U.S.C. § 2112(a)(5) provides as follows:

> All courts in which proceedings are instituted with respect to the same order, other than the court in which the record is filed pursuant to this subsection, shall transfer those proceedings to the court in which the record is so filed. For the convenience of the parties in the interest of justice, the court in which the record is filed may thereafter transfer all of the proceedings with respect to that order to any other court of appeals.

Marathon case to this Court so it may then transfer it back to the Tenth Circuit along with these cases, then this can easily be achieved.[y] Accordingly, if the Court determines that the Marathon case must first be transferred here, then it should at this time determine that it will thereafter transfer these cases and Marathon to the Tenth Circuit.

B. Convenience Favors a Transfer to the Tenth Circuit.

Marathon and Murphy also offer several faulty arguments in support of their contention that it will be more convenient for these cases to be heard in this Court, even though counsel for two of the four parties are located in Denver and another is located in Dallas, which is obviously closer to Denver than to Philadelphia.

Samson and Murphy first argue that the pendency of Marathon's petition in the Tenth Circuit makes no difference because that court has requested Marathon and EPA to address the question of whether it lacks jurisdiction because Marathon's petition was filed 46 days after EPA's October 3, 2001 administrative order. Samson/Murphy Opp. at 5. EPA intends to inform the Tenth Circuit that Marathon's challenge to EPA's October 3, 2001 administrative order was

---

28 U.S.C. § 2112(a)(5).

[y] Marathon has not asked the Tenth Circuit to transfer its petition to this Court, and its counsel has informed EPA's counsel that the Tenth Circuit is obviously a more convenient forum for its purposes than is this Court. EPA agrees with Samson and Murphy only to this extent: because the Samson case was filed in this Court before Marathon was filed in the Tenth Circuit, only this Court has the discretionary authority under the second sentence of 28 U.S.C. § 2112(a)(5) to order transfer of any of the cases "for the convenience of the parties in the interest of justice." If this Court elects not to grant EPA's transfer motion, the Tenth Circuit would be required under the first sentence of § 2112(a)(5) to transfer Marathon to this Court. We do not agree, however, that the Tenth Circuit's ministerial action must precede this Court's discretionary decision.

timely filed under EPA's regulations.[4] That being the case, it is highly doubtful that the Tenth Circuit will find that it lacks jurisdiction over Marathon's petition due to a timeliness defect. Accordingly, the pendency of the Marathon petition in the Tenth Circuit is a significant factor in determining whether these cases should be transferred to that court.

Samson and Murphy also argue that Marathon's petition should not be taken into account because that petition challenges only the October 3, 2001 amended administrative order and not the September 20, 2001 administrative order that preceded it. Thus, according to Samson and Murphy, Marathon is limited to challenging EPA's decisions to extend certain deadlines in the September 20 order at the companies' request. and to remove Samson Investment Company as a respondent to the order at Samson's request. Samson/Murphy Opp. at 5-6. While EPA takes no position at this time on the merits of this argument as it may affect Marathon's petition, it is not at all persuasive with respect to EPA's motion to transfer. It is a certainty that Marathon will oppose any attempt to so limit its challenge to EPA's order. And it is likely that the scope of Marathon's petition will have to be determined when the parties brief the merits of that petition. Accordingly, Samson and Murphy are off-base in their assertion that these cases should not be transferred to the Tenth Circuit because Marathon's petition is more limited in scope than are their petitions.

Samson and Murphy next argue that it is their choice of forum that is controlling.

---

[4] 42 U.S.C. § 300j-7(a)(2) requires that a petition for review, such as the one filed by Marathon, must be filed within 45 days of the date of the final agency action being challenged. EPA's regulation at 40 C.F.R. § 23.7 essentially provides that the time and date of an EPA action for purposes of judicial review under 42 U.S.C. § 300j-7 (a) (2), is two weeks after the date of the relevant order. Marathon's challenge to EPA's October 3, 2001 order was timely filed when EPA's regulation is taken into account.

Samson/Murphy Opp. at 6-7. However, it was Samson who originally chose the Tenth Circuit when challenging the preceding EPA administrative order that is substantially related to the one they challenge here. Samson's first choice should be controlling. Moreover, Congress has provided that the convenience of all the parties should be considered under 28 U.S.C. § 2112(a). Just because Murphy and Samson were able to "choose" the Third Circuit under the Safe Drinking Water Act's venue provision and Marathon was not, does not mean that Samson and Murphy should be able to impose their will on Marathon. Marathon's counsel is located in Denver and the Tenth Circuit is obviously a more convenient forum for Marathon. As previously noted, that court is also clearly more convenient for EPA's Denver-based counsel and for Samson's Dallas-based counsel.[3] Accordingly, Samson and Murphy's choice of forum should not be controlling.

C. **Judicial Economy Favors a Transfer to the Tenth Circuit.**

Samson and Murphy argue that Samson's own Tenth Circuit petition should not be taken into account because it has been in mediation and may become moot. Samson/Murphy Opp. at 7-8. The order Samson challenges in the Tenth Circuit requires it and the other companies to supply

---

[3] Samson's assertion that Philadelphia is equally as convenient as Denver for its Dallas counsel defies common sense. See Opposition at 7 n.3. Dallas is clearly closer geographically to Denver than it is to Philadelphia. It will obviously take less time for Samson's counsel to travel to Denver for any argument or other proceedings than to Philadelphia. See United Steelworkers of America v. Marshall, 592 F.2d 693.697 (3rd Cir. 1979) ("The only significant convenience factor which affects petitioners seeking review of rulemaking on an agency record is the convenience of counsel who will brief and argue the petitions"). Samson's assertion regarding the convenience of this Court is also belied by the fact that Samson previously filed a petition challenging the preceding and related EPA administrative order in the Tenth Circuit.

bottled water to a number of residences on the Fort Peck Indian Reservation.[9] Among other things, the orders challenged here require the companies to provide a more permanent supply of water. Thus, the only way that Samson's Tenth Circuit petition can become even partially moot is if Samson and the other companies provide the required permanent water source, thereby obviating the need for the bottled water. In that event, these petitions may likewise become moot on the alternative water supply requirement and one court -- the Tenth Circuit where the original Samson petition has long been pending -- should be able to address the mootness issue with respect to all the various petitions.

Moreover, as we previously indicated, the Tenth Circuit mediator is already familiar with the underlying facts surrounding the orders and the concerns of two of the parties. If the companies intend to comply with all of the provisions of the challenged orders -- and EPA currently understands that they do -- then, like Samson's first petition, these cases should be in mediation in the Tenth Circuit until such time as compliance is achieved. Then all these cases can be dismissed as moot.

Samson's contention that it will seek a transfer of its older Tenth Circuit petition to this Court if it is not eventually dismissed as moot by September 2002 wholly misses the mark. It is entirely inconsistent with notions of judicial economy for Samson to file related petitions in two different Courts and then assert that it should be able to unilaterally control when and if one of its challenges should be transferred so that one Court will have both petitions. There is no need to

---

[9] It also requires the companies to provide EPA with certain documents regarding the companies' operations in a defined geographic area within the Fort Peck Reservation. That requirement is a continuing one.

wait until September before all the petitions challenging EPA's administrative orders are transferred to one court. This Court should now transfer these petitions to the Tenth Circuit so that that Court will have all of the related petitions before it.

Finally, Samson and Murphy suggest that there would be nothing wrong with having two different courts consider the merits of similar challenges to the same EPA administrative order and issue inconsistent judgments. Samson/Murphy Opp. at 8 n.4. This suggestion requires little response. The waste of judicial resources involved in having two different Courts of Appeals consider a challenge to a single EPA administrative order is alone reason enough for a transfer. Moreover, inconsistent judgments would leave all parties unsure of their rights and obligations and would hamper EPA's ability to address the groundwater contamination associated with the companies' past activities on the Fort Peck Reservation. Perhaps this is what Samson and Murphy have in mind. Regardless of the companies' motivations, it is clear that inconsistent judgments would thwart Congress' intention that EPA should have the ability to address contamination of drinking water in an expeditious manner. Thus, the possibility of inconsistent judgments alone is reason enough for a transfer of these cases to the Tenth Circuit.

CONCLUSION

For all these reasons, as well as those stated in EPA's motion to transfer, the Court should transfer these cases to the Tenth Circuit under 28 U.S.C. § 2112(a)(5).

Respectfully submitted,

THOMAS L. SANSONETTI
Assistant Attorney General
Environment & Natural Resources Division

David A. Carson
U.S. Department of Justice
Environment and Natural Resources Division
Suite 945 - North Tower, 999 18th Street
Denver, Colorado 80202
(303) 312-7309

Of Counsel:

Richard Witt
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Steven B. Moores
Associate Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
Denver, Colorado 80202

James Eppers
Senior Enforcement Attorney
Legal Enforcement Program
U.S. Environmental Protection Agency
Denver, Colorado 80202

Date: January 14, 2002

CERTIFICATE OF SERVICE

It is hereby certified that on this date the undersigned caused a true and correct copy of the foregoing Reply Memorandum in Support of Motion to Transfer to be mailed to the following counsel by first class United States mail.

Scott M. DuBoff
Wright & Talisman, P.C.
1200 G. Street, N.W.
Suite 600
Washington, D.C. 20005-3802

Elizabeth E. Mack
Locke Lidell, & Sapp, L.L.C.
2200 Ross Avenue
Suite 2200
Dallas, Texas 75201-6776

Thomas H. Chiacchio, Jr.
Blank Rome Comisky & McCauley, LLP
One Logan Square
Philadelphia, Pennsylvania 19103-6998

With a courtesy copy to:

John D. Fognani
Lauren C. Buehler
555 17th Street, 26th Floor
Denver, CO 80202

Date: January 14, 2002

Linda Lutton

U.S. Department of Justice

Environment and Natural Resources Division

LJG:DAC

David A. Carson
Environmental Defense Section
999 18th Street
Suite 945 North Tower
Denver, CO 80202

Telephone (303) 312-7309
Facsimile (303) 312-7331

December 14, 2001

via federal express

P. Douglas Sisk
21400 United States Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106-1790

Re: Samson Hydrocarbons Co. v. EPA, Nos. 01-3672 & 01-4304 (3rd Cir.); Murphy Exploration and Production Co. v. EPA, No. 01-3936

Dear Mr. Sisk:

Enclosed please find the original and three copies of a Motion to Transfer in these consolidated cases. Copies have been served in accordance with the attached Certificate of Service.

Please do not hesitate to call me at (303) 312-7309 if you have any questions.

Sincerely,

David A. Carson, Senior Trial Counsel
Environmental Defense Section

enclosure

cc: James Eppers
Steven Moores
Nathan Wiser
Richard Witt

U.S. Department of Justice

Environment and Natural Resources Division

LJG : DAC

David A. Carson
Environmental Defense Section
999 18th Street
Suite 945 North Tower
Denver, CO 80202

Telephone (303) 312-7309
Facsimile (303) 312-7331

December 14, 2001

via federal express

Scott M. DuBoff
Wright & Talisman, P.C.
1200 G. Street, N.W.
Suite 600
Washington, D.C. 20005-3802

Elizabeth E. Mack
Locke Lidell, & Sapp, L.L.C.
2200 Ross Avenue
Suite 2200
Dallas, Texas 75201-6776

Re: Samson Hydrocarbons Co. v. EPA, Nos. 01-3672 & 01-4304 (3rd Cir.); Murphy Exploration and Production Co. v. EPA, No. 01-3936

Dear Ms. Mack and Mr. DuBoff:

Enclosed please find a Motion to Transfer these cases to the Tenth Circuit. I hope that you will not oppose this motion as I believe the Tenth Circuit is clearly the most convenient court for the parties regardless of whether the cases are litigated or mediated. This is especially true in light of the recently filed Marathon case in the Tenth Circuit.

I normally try to avoid filing motions over the December holidays, but I did not think this matter should wait. I will be out of the office for the next few days. Accordingly, if you decide to oppose this motion, and if either or both of you need additional time to respond to the motion due to the holidays, you may represent to the court that I do not oppose a one-week to ten-day extension of time for your response.

I hope you enjoy the holidays.

Sincerely,

David A. Carson, Senior Trial Counsel
Environmental Defense Section

enclosure

cc: James Eppers
Steven Moores
Nathan Wiser
Richard Witt

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Samson Hydrocarbons Company, Petitioner, v. United States Environmental Protection Agency, Respondent.	)	Case No. 01-3672 and Case No. 01-4304
Murphy Exploration & Production Company, Petitioner, v. United States Environmental Protection Agency, Respondent.	)	Case No. 01-3936

MOTION TO TRANSFER

Under 28 U.S.C. § 2112(a)(5), Respondent United States Environmental Protection Agency ("EPA") hereby moves to transfer all of these cases to the United States Court of Appeals for the Tenth Circuit. The reasons for this motion are as follows:

1. On November 30, 2000, EPA issued an administrative order under section 1431 of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300i, to petitioners Samson Hydrocarbons Company ("Samson") and Murphy Exploration & Production Company ("Murphy"), and to others, including Marathon Oil Company ("Marathon"). The order dealt with remediation of groundwater contamination

from the East Poplar Oil Field, located on the Fort Peck Indian Reservation, in the northeast corner of the State of Montana. Slightly less than a year ago, on January 9, 2001, Samson and an affiliate challenged that administrative order in the United States Court of Appeals for the Tenth Circuit. Samson Investment Co. & Samson Hyrdrocarbons Co. v. EPA, Case No. 01-9500 (10th Cir.). A copy of that petition is attached.[1]

2. Approximately 10 months later, on September 20, 2001, EPA issued a second order to Samson, Murphy, Marathon and others ("the companies") under SDWA section 1431, again relating to the Fort Peck contamination problem. While they are separate orders, the November 30, 2000 order and the September 20, 2001 order share substantial similarities. The November 30, 2000 order requires the companies to produce documents to EPA relating to certain of their activities for a defined geographic area with the Fort Peck Reservation. The September 20, 2001 order requires the companies to produce documents to EPA relating to certain of their activities at another defined geographic area within the Fort Peck Reservation. The November 30, 2000 order requires the companies to provide bottled water to certain residences within the Fort Peck Reservation. The September 20, 2001 order requires the companies to provide complete water

[1] Samson's petition was referred to the Tenth Circuit's mediation program, where it has been since it was filed. While the substance of the parties' discussions with the mediator are strictly confidential, the parties have made progress during those discussions. Thus, the Tenth Circuit mediator has become familiar with the underlying facts, issues, and concerns of at least two of the parties, EPA and Samson, with respect to the groundwater contamination emanating from the East Poplar Oil Field and with EPA's attempts to address that contamination.

replacement to the same residences. In addition, the September 20, 2001 order requires the companies to identify and monitor the leading edges of the contamination plume and assess any threat to any public water supply system used by people in and around the City of Poplar, Montana. EPA amended its September 20, 2001 order on October 3, 2001, at the request of Petitioners, in order to modify certain deadlines contained in the order.

3. On September 27, 2001, Samson filed a petition in this Court (Case No 01-3672, one of the petitions at issue in this motion to transfer) challenging EPA's September 20, 2001, administrative order, notwithstanding the pendency of its previously filed and closely related challenge to the earlier order in the Tenth Circuit.

4. On October 10, 2001, Samson filed an "Amended Petition for Review" in this Court, challenging EPA's October 3, 2001, amended order. The Court treated Samson's Amended Petition as a new petition, assigning it Case Number 01-4304.

5. Thereafter, on October 24, 2001, Murphy filed its own petition in this Court (No. 01-3936), challenging EPA's September 20, 2001 order, as amended on October 3, 2001.[2]

6. On November 20, 2001, Marathon, another recipient of EPA's October 3 Amended Order, also filed a petition for review of that Amended Order, but in the Tenth Circuit, where Samson's petition relating to the November 2000 order has

---

[2] Because the October 3, 2001 amended order supercedes the September 20, 2001 order, we will hereinafter refer to both orders as the "October 3 Amended Order."

been pending for the past year. Marathon Oil Co. v. EPA, Case No. 01-9543 (10th Cir.). A copy of Marathon's petition is attached.

7. The three petitions pending before this Court have since been consolidated with one another. As a consequence of all the above, at present there are two petitions pending in the Tenth Circuit and three consolidated petitions pending before this Court, all dealing with the same issue: contamination of the drinking water supplies at the Fort Peck Indian Reservation in Montana and EPA's attempts to address that contamination through administrative orders issued to the petitioners and others under the SDWA. As discussed infra, this situation could result in a significant duplication of effort by the parties, an inefficient use of judicial resources, and the possibility of conflicting outcomes. Accordingly, transfer of all the petitions to the same circuit – the Tenth Circuit, which is the first to have received a petition related to these issues – is in the interest of justice

8. The SDWA's judicial review provision states, in pertinent part, that petitions for review of EPA final actions of the type challenged by Samson, Murphy, and Marathon "may be filed in the circuit in which the petitioner resides or transacts business which is directly affected by the action." 42 U.S.C. § 300j-7. Because both Samson and Murphy are incorporated in Delaware, which is within this Circuit, their petitions are properly in this Court. Samson obviously also could have filed its petitions in the Tenth Circuit, as evidenced by the fact that it previously challenged EPA's November 30, 2000, administrative order in the Tenth Circuit. EPA understands from its discussions with counsel for both

Samson and Murphy that Murphy could not have originally filed its petition in the Tenth Circuit and that Marathon could not have filed its petition in the Third Circuit. Thus, neither this Court nor the Tenth Circuit would have originally had venue over each and all of the petitions.

9. 28 U.S.C. § 2112(a)(5) provides:

> All courts in which proceedings are instituted with respect to the same order, other than the court in which the record is filed pursuant to this subsection, shall transfer those proceedings to the court in which the record is filed. For the convenience of the parties in the interest of justice, the court in which the record is filed may thereafter transfer all proceedings with respect to that order to any other court of appeals.

28 U.S.C. § 2112(a)(5) (emphasis added). EPA has filed in this Court the Certified Index to the administrative record for both Samson's initial Third Circuit petition and for Murphy's petition. Therefore, pursuant to 28 U.S.C. § 2112(a)(5), this Court may transfer these Petitions to the Tenth Circuit if it is convenient for the parties and in the interest of justice.

10. Here, on balance, both the convenience of the parties and the interests of justice favor a transfer of all these petitions to the Tenth Circuit. For nearly a year now, the Tenth Circuit has had before it a petition dealing with the same site, two of the same parties, the same statute, and many of the same issues. A second petition relating to the same orders challenged in this Court has also since been filed there. Both EPA and Marathon's counsel reside in Denver, Colorado, where the Tenth Circuit sits. Moreover, the administrative orders were all issued by EPA Region

VIII, which is located in Denver. Thus, it is clear that it would be more convenient for two of the parties, Marathon and EPA, if all of the challenges to EPA's October 3 Amended Order were heard in Denver. The Tenth Circuit is also obviously convenient for Samson, because its counsel, who resides in Dallas, Texas, and who also represents Samson in the Tenth Circuit proceeding, challenged EPA's November 30, 2000, order in the Tenth Circuit. While Murphy's counsel is located in Washington, D.C., and would likely consider the Third Circuit to be a more convenient forum, on balance, the Tenth Circuit is the most convenient forum because it is more convenient for counsel for two parties (Marathon and EPA) and equally convenient, if not more so, for counsel for a third party (Samson). Therefore, the convenience of the parties favors a transfer of these cases to the Tenth Circuit. See United Steelworkers of America v. Marshall, 592 F.2d 693,697 (3rd Cir. 1979) ("The only significant convenience factor which affects petitioners seeking review of rulemaking on an agency record is the convenience of counsel who will brief and argue the petitions").

11. The interests of justice likewise favors a transfer of these cases to the Tenth Circuit. As discussed above, while EPA's October 3 Amended Order is different in some respects from its November 30, 2000 order, it also shares many similarities. For instance, it concerns the same contaminated groundwater and involves nearly the same parties and was issued under the same legal authority. In addition, the November 2000 order requires the companies to provide bottled drinking water to certain residences on the Fort Peck Reservation; the October 3

order requires the companies to provide a complete water replacement to the same houses. Both orders require the companies to produce documents, albeit different ones, relating to activities which may have polluted the groundwater. The legal issues surrounding these requirements will likely be the same. Thus, if the issues are to be litigated, judicial economy favors a transfer of these petitions to the Tenth Circuit where the first petition dealing with these issues has now been pending for a substantial period of time. This is especially true now that Marathon has filed its Tenth Circuit petition challenging the same EPA order that is challenged in these cases.

12. The same is true if these cases are to be mediated without active litigation. We note that the consolidated Samson and Murphy cases pending before this Court have been set for an initial mediation conference call on February 7, 2002, under this Court's mediation program, and the parties were required to file their position papers with the Circuit Mediation Office by December 5, 2001. In fact, in its Concise Statement of Facts and Issues in Case Number 01-3672, Samson stated, "Because Samson believes the parties could resolve their differences through continued discussions, Samson believes that this case is a good candidate for this Court's mediation program. Samson requests that all briefing deadlines be stayed pending a full opportunity for mediation." Samson's Concise Statement of Facts and Issues at 2. A transfer to the Tenth Circuit would also serve the interest of justice if the cases are to be mediated, because the Tenth Circuit Mediator has been involved in Samson's initial petition since it was filed and he is already

familiar with the underlying facts, issues and the positions of at least two of the parties.

For all these reasons, the Court should transfer these cases to the Tenth Circuit under 28 U.S.C. § 2112(a)(5).

Respectfully submitted,

JOHN C. CRUDEN
Acting Assistant Attorney General
Environment & Natural Resources Division

David A. Carson
U.S. Department of Justice
Environment and Natural Resources Division
Suite 945 - North Tower, 999 18th Street
Denver, Colorado 80202
(303) 312-7309

Of Counsel:

Steven B. Moores
Associate Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
Denver, Colorado 80202
(303) 312-6857

James Eppers
Senior Enforcement Attorney
Legal Enforcement Program
U.S. Environmental Protection Agency
Denver, Colorado 80202
(303) 312-6893

Date: December 14, 2001

CERTIFICATE OF SERVICE

It is hereby certified that on this date the undersigned caused a true and correct copy of the foregoing Motion to Transfer to be mailed to the following counsel by the methods indicated below:

Scott M. DuBoff (by Federal Express)
Wright & Talisman, P.C.
1200 G. Street, N.W.
Suite 600
Washington, D.C. 20005-3802

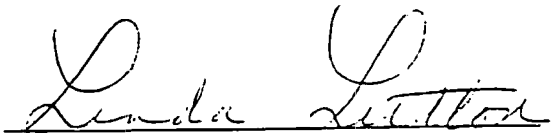
Elizabeth E. Mack (by Federal Express)
Locke Lidell, & Sapp, L.L.C.
2200 Ross Avenue
Suite 2200
Dallas, Texas 75201-6776

Thomas H. Chiacchio, Jr. (by First Class mail)
Blank Rome Comisky & McCauley, LLP
One Logan Square
Philadelphia, Pennsylvania 19103-6998

With a courtesy copy to:

John D. Fognani (by First Class mail)
Lauren C. Buehler
555 17th Street, 26th Floor
Denver, CO 80202

Date: December 14, 2001



Linda Lutton

BLANK ROME COMISKY & MCCAULEY LLP
Counselors at Law

Direct Dial: 215-569-5364
Fax: 215-832-5364
Email: chiacchio@blankrome.com

Delaware
Florida
Maryland
New Jersey
New York
Ohio
Pennsylvania
Washington, DC

October 10, 2001

VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED

TO: ALL COUNSEL AND PARTIES OF RECORD

Re: Samson Hydrocarbons Company v. EPA
U.S. Court of Appeals for the Third Circuit, No. 01-3672

Dear Counsel:

Enclosed please find copies of the following documents filed by Samson Hydrocarbons Company in the above-referenced matter:

1. Corporate Disclosure Statement and Statement of Financial Interest;
2. Entry of Appearance;
3. Docketing Statement;
4. Application for Admission to Practice for Cynthia Timms; and
5. Application for Admission to Practice for Elizabeth Mack.

Very truly yours,

THOMAS H. CHIACCHIO, JR.

/lb
Enclosures
cc: with enclosure

Dean R. Massey	Michael Webster
Steve Leifer	John W. Ross
Candace Walker	Jim Eppers
Hon. Christine Todd Whitman	John Cruden
James E. Baine	Robert L. Sterup

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 01-3672

Samson Hydrocarbons Company vs. Environmental Protection Agency

The Clerk will enter my appearance as Counsel of Record for (please list names of all parties represented, using additional sheet(s) if needed):

Samson Hydrocarbons Company

who IN THIS COURT is (please check only one):

X Petitioner(s)	_____ Appellant(s)	_____ Intervenor (s)
_____ Respondent(s)	_____ Appellee(s)	_____ Amicus Curiae

(Type or Print) Name Elizabeth E. Mack

Mr. (Ms.) Mrs. Miss

Firm Locke Liddell & Sapp LLP

Address 2200 Ross Avenue, Suite 2200

City & State Dallas, Texas

Zip Code 76002

Phone (214) 740-8000

Fax (214) 740-8800

Email Address emack@lockeliddell.com

SIGNATURE OF COUNSEL: Elizabeth E Mack

ONLY COUNSEL OF RECORD SHALL ENTER AN APPEARANCE AND ONLY THAT ATTORNEY WILL BE THE ONE NOTIFIED OF THE COURT'S ACTION IN THIS CASE. OTHER ATTORNEYS WHO DESIRE NOTIFICATION SHOULD MAKE APPROPRIATE ARRANGEMENTS WITH COUNSEL OF RECORD.

ONLY ATTORNEYS WHO ARE MEMBERS OF THE BAR OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT OR WHO HAVE SUBMITTED A PROPERLY COMPLETED APPLICATION FOR ADMISSION TO THIS COURT'S BAR MAY FILE AN APPEARANCE FORM. (BAR ADMISSION IS WAIVED FOR FEDERAL ATTORNEYS.)

IT IS IMPORTANT THAT ALL REQUESTED INFORMATION BE PROVIDED AND THAT COUNSEL SIGN THE FORM IN THE APPROPRIATE AREA.

REV. 04/16/01

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Entry of Appearance as Counsel of Record has been served via certified mail, return receipt requested upon the following counsel of record who are admitted to participate in the agency proceedings, on this 10 day of October, 2001:

Dean R. Massey
Massey, Semenoff, Stern & Schwarz, P.C.
The Equitable Bldg. Suite 300
730 17th Street
Denver, CO 80202

Michael Webster
Crowley, Haughey, Hanson, Toole & Dietrich, P.L.L.P.
490 N. 31 Street
Billings, MT 59101

Steve Leifer
Baker & Botts LLP
The Warner
1299 Pennsylvania Ave NW
Washington, DC 20004-2400

John W. Ross
The Brown Law Firm
315 N. 24th Street
P.O. Drawer 849
Billings, Montana 59103-0849

Candace Walker
Marathon Oil Company
Law Organization
P.O. Box 4813
Houston, TX 77210-4813

Jim Eppers
U.S. Environmental Protection Agency
Region 8
999-18th Street, Suite 300
Denver, CO 80202-2466

Hon. Christine Todd Whitman
EPA Administrator
U.S. Environmental Protection Agency
Waterside Mall
401 M Street, S.W.
Washington, DC 20460

John Cruden
Acting Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice
950 Pennsylvania Avenue, Room 2143
Washington, DC 20530

James E. Baine
Murphy Exploration & Production Co.
200 Peach Street
El Dorado, AK 71730

Robert L. Sterup
Dorsey & Whitney, LLP
P.O. Box 7188
Billings, MT 59103

Thomas H. Chiacchio, Jr.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 01-3672

Samson Hydrocarbons Company vs. Unites States Environmental Protection Agency

The Clerk will enter my appearance as Counsel of Record for (please list names of all parties represented, using additional sheet(s) if needed):

United States Environmental Protection Agency

who IN THIS COURT is (please check only one):

_____ Petitioner(s) _____ Appellant(s) _____ Intervenor (s)

__X__ Respondent(s) _____ Appellee(s) _____ Amicus Curiae

(Type or Print) Name Mr. David A. Carson

Mr. Ms. Mrs. Miss

Firm United States Department of Justice, Environment and Natural Resources Division

Address Suite 945 - North Tower, 999 18th Street

City & State Denver, Colorado

Zip Code 80202

Phone (303) 312-7309

Fax (303) 312-7331

Email Address david.a.carson@usdoj.gov

SIGNATURE OF COUNSEL: _____

ONLY COUNSEL OF RECORD SHALL ENTER AN APPEARANCE AND ONLY THAT ATTORNEY WILL BE THE ONE NOTIFIED OF THE COURT'S ACTION IN THIS CASE. OTHER ATTORNEYS WHO DESIRE NOTIFICATION SHOULD MAKE APPROPRIATE ARRANGEMENTS WITH COUNSEL OF RECORD.

ONLY ATTORNEYS WHO ARE MEMBERS OF THE BAR OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT OR WHO HAVE SUBMITTED A PROPERLY COMPLETED APPLICATION FOR ADMISSION TO THIS COURT'S BAR MAY FILE AN APPEARANCE FORM. (BAR ADMISSION IS WAIVED FOR FEDERAL ATTORNEYS.)

IT IS IMPORTANT THAT ALL REQUESTED INFORMATION BE PROVIDED AND THAT COUNSEL SIGN THE FORM IN THE APPROPRIATE AREA.

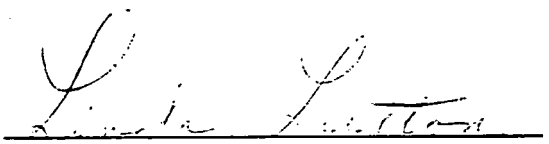
CERTIFICATE OF SERVICE

It is hereby certified that on this date the undersigned caused a true and correct copy of the foregoing Entry of Appearance to be mailed to the following counsel by first class United States mail:

Elizabeth E. Mack
Locke Lidell, & Sapp, L.L.C.
2200 Ross Avenue
Suite 2200
Dallas, Texas 75201-6776

Thomas H. Chiacchio, Jr.
Blank Rome Comisky & McCauley, LLP
One Logan Square
Philadelphia, Pennsylvania 19103-6998

Date: October 19, 2001



Linda Lutton

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SAMSON HYDROCARBONS COMPANY,	§	
	§	
PETITIONER,	§	
	§	
v.	§	PETITION FOR REVIEW
	§	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	§	
	§	
RESPONDENT.	§	

Samson Hydrocarbons Company hereby petitions the court for review of the Emergency Administrative Order of the United States Environmental Protection Agency, Region VIII, Docket No. SDWA-8-2001-33, issued on September 20, 2001.

Respectfully submitted,

Elizabeth E. Mack
Texas Bar No. 12761050
Cynthia Keely Timms
Texas Bar No. 11161450
LOCKE LIDDELL & SAPP LLP
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201-6776
Telephone: (214) 740-8000
Facsimile: (214) 740-8800

ATTORNEY FOR PETITIONER
SAMSON HYDROCARBONS
COMPANY

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Petition for Review will be served via certified mail, return receipt requested upon the following counsel of record who are admitted to participate in the agency proceedings on this 28th day of September, 2001:

Dean R. Massey
Massey, Semenoff, Stern & Schwarz, P.C.
The Equitable Bldg. Suite 300
730 17th Street
Denver, CO 80202

Michael Webster
Crowley, Haughey, Hanson, Toole & Dietrich, P.L.L.P.
490 N. 31 Street
Billings, MT 59101

Steve Leifer
Baker & Botts LLP
The Warner
1299 Pennsylvania Ave NW
Washington, DC 20004-2400

John W. Ross
The Brown Law Firm
315 N. 24th Street
P.O. Drawer 849
Billings, Montana 59103-0849

Candace Walker
Marathon Oil Company
Law Organization
P.O. Box 4813
Houston, TX 77210-4813

Jim Eppers
U.S. Environmental Protection Agency
Region 8
999-18th Street, Suite 300
Denver, CO 80202-2466

Hon. Christine Todd Whitman
EPA Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue N.W.
Washington, DC 20460

John Cruden
Acting Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice
950 Pennsylvania Avenue, Room 2143
Washington, DC 20530

James E. Baine
Murphy Exploration & Production Co.
200 Peach Street
El Dorado, AK 71730

Robert L. Sterup
Dorsey & Whitney, LLP
P.O. Box 7188
Billings, MT 59103

I further hereby certify that true and correct copies of the foregoing Petition for Review will be served via hand delivery upon the General Counsel pursuant to 40 CFR § 23.12 on the 28th day of September, 2001.

General Counsel
Correspondence Control Unit
Office of the General Counsel (2311)
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

Elizabeth E. Mack

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPLICATION FOR ADMISSION TO PRACTICE

PART I -- TO BE COMPLETED BY ALL APPLICANTS

The undersigned hereby makes application for admission to practice and in support of his or her application states that he or she has been admitted to practice in the Northern District of Texas and is at present a member of the bar of that court in good standing.

In compliance with Rule 46.1 of the Local Appellate Rules of the United States Court of Appeals for the Third Circuit, I represent that I am familiar with the contents of the Federal Rules of (1) Civil and Criminal Procedure, and (2) Appellate Procedure, as well as with the Local Appellate Rules and Internal Operating Procedures of this Court, and I further represent that I have read and understand those provisions of the above documents dealing with briefs, motions and appendices.

Applicant's Signature
Cynthia Keely Timms

Firm Name: Locke Liddell & Sapp LLP

Office Address: 2200 Ross Avenue, Suite 2200

Dallas, Texas 75201

MOTION AND CERTIFICATE

I, Thomas A. Chiacchio Jr., a member of the bar of the United States Court of Appeals for the Third Circuit hereby move the admission of (PRINT THE NAME OF THE APPLICANT) Cynthia Keely Timms to practice in the said court and certify that he or she possesses the necessary qualifications and that his or her private and professional character is good.

Sponsor's Signature

NOTE: The name of the person signing above will appear on your formal certificate. Should this individual be a judge, please indicate so on this form.

PART II -- TO BE COMPLETED FOR ADMISSION ON WRITTEN MOTION ONLY

I, Cynthia Keely Timms, do solemnly swear (or affirm) that I will demean myself as an attorney and counselor of this Court, uprightly and according to law; and that I will support the Constitution of the United States.

NOTARY PUBLIC STATE OF TEXAS
Pamela R. Treni
Notary Public, State of Texas
My Comm. Expires 05/22/05

Applicant's Signature

SUBSCRIBED AND SWORN TO BEFORE ME THIS 3rd DAY OF October, 2001

Pamela P. Treni

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Application for Admission to Practice has been served via certified mail, return receipt requested upon the following counsel of record who are admitted to participate in the agency proceedings, on this 10th day of October, 2001:

Dean R. Massey
Massey, Semenoff, Stern & Schwarz, P.C.
The Equitable Bldg. Suite 300
730 17th Street
Denver, CO 80202

Michael Webster
Crowley, Haughey, Hanson, Toole & Dietrich, P.L.L.P.
490 N. 31 Street
Billings, MT 59101

Steve Leifer
Baker & Botts LLP
The Warner
1299 Pennsylvania Ave NW
Washington, DC 20004-2400

John W. Ross
The Brown Law Firm
315 N. 24th Street
P.O. Drawer 849
Billings, Montana 59103-0849

Candace Walker
Marathon Oil Company
Law Organization
P.O. Box 4813
Houston, TX 77210-4813

Jim Eppers
U.S. Environmental Protection Agency
Region 8
999-18th Street, Suite 300
Denver, CO 80202-2466

Hon. Christine Todd Whitman
EPA Administrator
U.S. Environmental Protection Agency
Waterside Mall
401 M Street, S.W.
Washington, DC 20460

John Cruden
Acting Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice
950 Pennsylvania Avenue, Room 2143
Washington, DC 20530

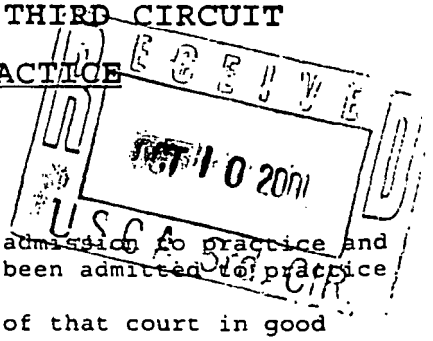
James E. Baine
Murphy Exploration & Production Co.
200 Peach Street
El Dorado, AK 71730

Robert L. Sterup
Dorsey & Whitney, LLP
P.O. Box 7188
Billings, MT 59103

Thomas H. Chiacchio, Jr.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPLICATION FOR ADMISSION TO PRACTICE



PART I -- TO BE COMPLETED BY ALL APPLICANTS

The undersigned hereby makes application for admission to practice and in support of his or her application states that he or she has been admitted to practice in the Northern District of Texas and is at present a member of the bar of that court in good standing.

In compliance with Rule 46.1 of the Local Appellate Rules of the United States Court of Appeals for the Third Circuit, I represent that I am familiar with the contents of the Federal Rules of (1) Civil and Criminal Procedure, and (2) Appellate Procedure, as well as with the Local Appellate Rules and Internal Operating Procedures of this Court, and I further represent that I have read and understand those provisions of the above documents dealing with briefs, motions and appendices.

Elizabeth E. Mack

Applicant's Signature
Elizabeth E. Mack

Firm Name: Locke Liddell & Sapp LLP

Office Address: 2200 Ross Avenue, Suite 2200

Dallas, Texas 75201

MOTION AND CERTIFICATE

I, Thomas H. Chiarchio Jr., a member of the bar of the United States Court of Appeals for the Third Circuit hereby move the admission of (PRINT THE NAME OF THE APPLICANT) Elizabeth E. Mack to practice in the said court and certify that he or she possesses the necessary qualifications and that his or her private and professional character is good.

Sponsor's Signature

NOTE: The name of the person signing above will appear on your formal certificate. Should this individual be a judge, please indicate so on this form.

PART II -- TO BE COMPLETED FOR ADMISSION ON WRITTEN MOTION ONLY

I, Elizabeth E. Mack, do solemnly swear (or affirm) that I will demean myself as an attorney and counselor of this Court, uprightly and according to law; and that I will support the Constitution of the United States.

NOTARY PUBLIC STATE OF TEXAS
Pamela R. Treni
Notary Public, State of Texas
My Comm. Expires 05/22/05

Elizabeth E. Mack

Applicant's Signature

SUBSCRIBED AND SWORN TO BEFORE ME THIS 3rd DAY OF October, 2001

Pamela P. Treni

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Application for Admission to Practice has been served via certified mail, return receipt requested upon the following counsel of record who are admitted to participate in the agency proceedings, on this 1st day of October, 2001:

Dean R. Massey
Massey, Semenoff, Stern & Schwarz, P.C.
The Equitable Bldg. Suite 300
730 17th Street
Denver, CO 80202

Michael Webster
Crowley, Haughey, Hanson, Toole & Dietrich, P.L.L.P.
490 N. 31 Street
Billings, MT 59101

Steve Leifer
Baker & Botts LLP
The Warner
1299 Pennsylvania Ave NW
Washington, DC 20004-2400

John W. Ross
The Brown Law Firm
315 N. 24th Street
P.O. Drawer 849
Billings, Montana 59103-0849

Candace Walker
Marathon Oil Company
Law Organization
P.O. Box 4813
Houston, TX 77210-4813

Jim Eppers
U.S. Environmental Protection Agency
Region 8
999-18th Street, Suite 300
Denver, CO 80202-2466

Hon. Christine Todd Whitman
EPA Administrator
U.S. Environmental Protection Agency
Waterside Mall
401 M Street, S.W.
Washington, DC 20460

John Cruden
Acting Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice
950 Pennsylvania Avenue, Room 2143
Washington, DC 20530

James E. Baine
Murphy Exploration & Production Co.
200 Peach Street
El Dorado, AK 71730

Robert L. Sterup
Dorsey & Whitney, LLP
P.O. Box 7188
Billings, MT 59103

Thomas H. Chiacchio, Jr.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DOCKETING STATEMENT

Administrative Agency Review/Enforcement Proceedings
(To be completed by Petitioner)

1. DOCKET NO.: 01-3672 2. DATE DOCKETED: 9/27/01

3. CASE NAME (Lead Parties Only) Samson Hydrocarbons Company v. Environmental Protection Agency

4. TYPE OF CASE: Review X Enforcement _____

5. CASE INFORMATION:

a. Identify agency whose order is to be reviewed: Environmental Protection Agency

b. Give agency docket or docket number(s): SWDA-8-2001-33

c. Give date(s) of order(s): 9/20/01

d. Is a request for rehearing or reconsideration pending at the agency?
_____Yes X No

e. Are any other cases involving the same underlying agency order pending in this Court or in any other court? _____Yes X No

If Yes, identify name(s), docket number(s), and court(s):

_____

_____

f. Are any other cases, to counsel's knowledge, pending before the agency, this Court or the Supreme Court which involve substantially the same issues as the instant case presents? _____Yes X No

If Yes, give name(s) of these cases and identify court/agency:

Please see attached

_____

Signature: Elizabeth E Mack Date: 10/4/01

Name of Counsel or Pro Se Litigant (Print) Elizabeth E. Mack

Firm: Locke Liddell & Sapp LLP Phone: 214-740-8000

Address: 2200 Ross Avenue, Suite 2200, Dallas, Texas 75201

Name of Party Represented: Samson Hydrocarbons Company

ATTACH A CERTIFICATE OF SERVICE

NOTE: If counsel for any other party believes that the information submitted is inaccurate or incomplete, counsel may so advise the Clerk within 10 days by letter, with copies to all other parties, specifically referring to the challenged statement. An original and three copies of such letter should be submitted.

REV. 7/93

Although we are not aware of any other cases pending before the Agency, the Third Circuit, or the Supreme Court that involve substantially the same issues as this Petition for Review, we are aware of the case *Samson Hydrocarbons Company and Samson Investment Company v. United States Environmental Protection Agency*, 01-9500, pending in the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit appeal involves a different agency order, but it involves the East Poplar Oil Field. Therefore, some of the factual and legal issues may be similar in the two appeals.

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Docketing Statement has been served via certified mail, return receipt requested upon the following counsel of record who are admitted to participate in the agency proceedings, on this 10th day of October, 2001:

Dean R. Massey
Massey, Semenoff, Stern & Schwarz, P.C.
The Equitable Bldg. Suite 300
730 17th Street
Denver, CO 80202

Michael Webster
Crowley, Haughey, Hanson, Toole & Dietrich, P.L.L.P.
490 N. 31 Street
Billings, MT 59101

Steve Leifer
Baker & Botts LLP
The Warner
1299 Pennsylvania Ave NW
Washington, DC 20004-2400

John W. Ross
The Brown Law Firm
315 N. 24th Street
P.O. Drawer 849
Billings, Montana 59103-0849

Candace Walker
Marathon Oil Company
Law Organization
P.O. Box 4813
Houston, TX 77210-4813

Jim Eppers
U.S. Environmental Protection Agency
Region 8
999-18th Street, Suite 300
Denver, CO 80202-2466

Hon. Christine Todd Whitman
EPA Administrator
U.S. Environmental Protection Agency
Waterside Mall
401 M Street, S.W.
Washington, DC 20460

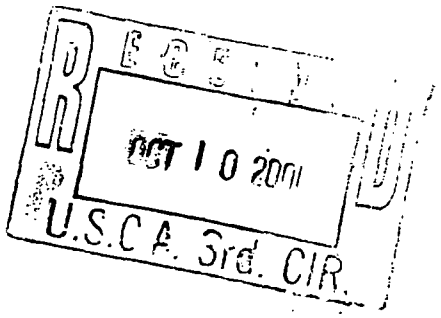
John Cruden
Acting Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice
950 Pennsylvania Avenue, Room 2143
Washington, DC 20530

James E. Baine
Murphy Exploration & Production Co.
200 Peach Street
El Dorado, AK 71730

Robert L. Sterup
Dorsey & Whitney, LLP
P.O. Box 7188
Billings, MT 59103

Thomas H. Chiacchio, Jr.

United States Court of Appeals for the Third Circuit



Corporate Disclosure Statement and Statement of Financial Interest

No. 01-3672

Samson Hydrocarbons Company

v.

Environmental Protection Agency

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. An original and three copies must be filed. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Samson Hydrocarbons Company (Name of Party) makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations: Samson Investment Company

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

Not Applicable

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

Not Applicable

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not Applicable

Elizabeth E. Mack

(Signature of Counsel or Party)

Elizabeth E. Mack

Dated: 10/4/01

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Corporate Disclosure Statement and Statement of Financial Interest has been served via certified mail, return receipt requested upon the following counsel of record who are admitted to participate in the agency proceedings, on this 10th day of October, 2001:

Dean R. Massey
Massey, Semenoff, Stern & Schwarz, P.C.
The Equitable Bldg. Suite 300
730 17th Street
Denver, CO 80202

Michael Webster
Crowley, Haughey, Hanson, Toole & Dietrich, P.L.L.P.
490 N. 31 Street
Billings, MT 59101

Steve Leifer
Baker & Botts LLP
The Warner
1299 Pennsylvania Ave NW
Washington, DC 20004-2400

John W. Ross
The Brown Law Firm
315 N. 24th Street
P.O. Drawer 849
Billings, Montana 59103-0849

Candace Walker
Marathon Oil Company
Law Organization
P.O. Box 4813
Houston, TX 77210-4813

Jim Eppers
U.S. Environmental Protection Agency
Region 8
999-18th Street, Suite 300
Denver, CO 80202-2466

Hon. Christine Todd Whitman
EPA Administrator
U.S. Environmental Protection Agency
Waterside Mall
401 M Street, S.W.
Washington, DC 20460

John Cruden
Acting Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice
950 Pennsylvania Avenue, Room 2143
Washington, DC 20530

James E. Baine
Murphy Exploration & Production Co.
200 Peach Street
El Dorado, AK 71730

Robert L. Sterup
Dorsey & Whitney, LLP
P.O. Box 7188
Billings, MT 59103

Thomas H. Chiacchio, Jr.

FEB - 1 2002

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Samson Hydrocarbons Company, Petitioner, v. United States Environmental Protection Agency, Respondent.	)	Case Nos. 01-3672 and 01-4304
Murphy Exploration & Production Company, Petitioner, v. United States Environmental Protection Agency, Respondent.	)	Case No. 01-3936

STATEMENT OF INTEREST OF NON-PARTY MARATHON OIL COMPANY AND REQUEST TO DELAY RULING ON EPA'S MOTION TO TRANSFER

1. Marathon Oil Company ("Marathon") has filed a Petition for Review in the Tenth Circuit concerning the same order at issue in this case. *Marathon Oil Co. v. EPA*, No. 01-9543 (10th Cir.). This Petition for Review was filed in the Tenth Circuit based upon the location of the site that is the subject of the order.

2. The Petitions for Review filed in this case by Samson Hydrocarbons Company ("Samson") and by Murphy Exploration & Production Company ("Murphy") pre-dated the Petition for Review filed by Marathon in the Tenth Circuit.

3. Because the first Petition for Review was filed in this Court, pursuant to 28 U.S.C. § 2112(a)(5), the Tenth Circuit must transfer the proceedings concerning Marathon's Petition to this Court, and this Court "[f]or the convenience of the parties in the interest of justice . . . may *thereafter* transfer all of the proceedings . . . to any other court of appeals." 28 U.S.C. § 2112(a)(5) (emphasis added). Marathon has already notified the Tenth Circuit of the earlier-filed Petitions for Review in this Court. *See* Marathon's January 25, 2002 Notice of Transfer Pursuant to 28 U.S.C. § 2112, attached hereto as Exhibit A.

4. The obvious reason for the requirement that the cases be consolidated in one court of appeals before the Court makes a transfer for convenience is to give all interested parties an opportunity to be heard on that issue. Because the U.S. Environmental Protection Agency ("EPA") filed its Motion to Transfer in this Court before the Tenth Circuit had an opportunity to transfer the proceedings relating to Marathon's Petition, Marathon has not had an opportunity to be heard on that Motion.

5. Before transferring the Marathon proceedings to this Court, the Tenth Circuit must resolve a perceived issue concerning that court's jurisdiction. In a December 21, 2001 Order, the Tenth Circuit ordered the parties to brief the jurisdictional issue. *See* Exhibit B attached hereto. The parties have briefed this issue in the Tenth Circuit, but the court has not yet ruled.

6. In its Reply Memorandum in Support of Motion to Transfer, EPA stated that Marathon's counsel had informed EPA's counsel that the Tenth Circuit is a more convenient forum for Marathon. While Marathon is certain that EPA did not intentionally mislead this Court, this statement is inaccurate or is the result of a

misunderstanding. To the contrary, Marathon takes no position at this time on EPA's Motion to Transfer, but Marathon would like to reserve the right to file a response to EPA's Motion if and when the Tenth Circuit determines that jurisdiction is proper and transfers the proceedings relating to Marathon's Petition to this Court, pursuant to 28 U.S.C. § 2112(a)(5). Until that time, Marathon is not a party to this case, but any disposition of EPA's Motion before the prerequisite transfer under 28 U.S.C. § 2112(a)(5) may prejudice Marathon's rights by effecting a transfer based on "the convenience of the parties" without allowing one of the parties to be heard on the issue of its convenience.

7. In their Response and in a recently filed Surreply, Samson and Murphy have argued that Marathon lacks standing because, in their opinion, Marathon challenged only the amended order and not the original order as well. This argument is wholly without merit and is unrelated to the jurisdictional issue raised by the Tenth Circuit and briefed by EPA and Marathon in that Circuit.[1] In addition, this argument was rejected by EPA's Senior Enforcement Attorney on this matter, Jim Eppers, in a voicemail to Marathon's counsel on November 5, 2001, two weeks before Marathon's Petition for Review was filed. *See* Exhibit C. More importantly, the attack on Marathon's position by Samson and Murphy in this case at a time when Marathon is not yet even a party illustrates perfectly why briefing on EPA's motion should not have occurred before the Tenth Circuit resolves the jurisdictional question and transfers the proceedings on

[1]With regard to the issue raised by the Tenth Circuit, EPA in its filings has unequivocally and correctly supported the Tenth Circuit's jurisdiction over Marathon's Petition for Review.

Marathon's Petition for Review to this Court.[2] At that time, Marathon should be given an opportunity to respond to EPA's Motion for Transfer.

Based on the above statement of interest in this case and on the express language of 28 U.S.C. § 2112 (a)(5), Marathon requests that this Court delay ruling on EPA's Motion to Transfer until the Tenth Circuit resolves the issue of jurisdiction over Marathon's Petition and, if jurisdiction is found, until the Tenth Circuit proceedings are transferred to this Court and Marathon has an opportunity to reply to EPA's Motion.

Dated: January 30, 2002.

Respectfully submitted,

John D. Fognani, Esq., Colo. Reg. #8280
Lauren C. Buehler, Esq., Colo. Reg. #29286
FOGNANI GUIBORD HOMSY & ROBERTS, LLP
555 – 17th Street, 26th Floor
Denver, CO 80202
Telephone: (303) 382-6200
Facsimile: (303) 382-6210

ATTORNEYS FOR
MARATHON OIL COMPANY

[2]Had EPA not prematurely filed its Motion to Transfer, the arguments raised by Samson and Murphy would likely have never been made as the parties would have had the benefit of the Tenth Circuit's decision resolving the jurisdiction over Marathon's petition for Review.

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of January 2002, a true and correct copy of the foregoing **STATEMENT OF INTEREST OF NON-PARTY MARATHON OIL COMPANY AND REQUEST TO DELAY RULING ON EPA'S MOTION TO TRANSFER** was served via first-class mail, postage prepaid, upon the following:

Elizabeth E. Mack, Esq.
Locke Liddell & Sapp LLP
2200 Ross Avenue, Suite 2200
Dallas, TX 75201-6776

Steve Leifer, Esq.
Baker & Botts LLP
The Warner
1299 Pennsylvania Ave., N.W.
Washington, DC 20004-2400

James E. Baine, Esq.
Murphy Exploration & Production Co.
200 Peach Street
El Dorado, AK 71730

David A. Carson, Esq.
United States Department of Justice
Environment and Natural Resources Div.
999 – 18th Street, North Tower, Suite 945
Denver, CO 80202

Jim Eppers, Esq.
U.S. Environmental Protection Agency
Region 8
999 – 18th Street, Suite 300
Denver, CO 80202-2466

Scott M. DuBoff
Wright & Talisman, P.C.
1200 "G" Street, N.W.
Suite 600
Washington, DC 20005-3802

Thomas H. Chiacchio, Jr.
Blank Rome Comisky & MCauley, LLP
One Logan Square
Philadelphia, PA 19103-6998

Barbara E. Hawk

#15763

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARATHON OIL COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 01-9543
	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	
	)	

NOTICE OF TRANSFER PURSUANT TO 28 U.S.C. § 2112

1. This notice is to advise the Court that Samson Hydrocarbons Company ("Samson") and Murphy Exploration & Production Company ("Murphy") have filed Petitions for Review in the United States Court of Appeals for the Third Circuit concerning the same Order at issue in this case.

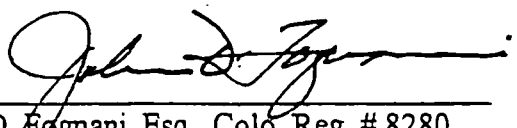
2. Marathon Oil Company ("Marathon") filed its Petition for Review in this Court pursuant to Section 1448 of the Safe Drinking Water Act, which states that a Petition for Review may be filed in either the Circuit in which the petitioner resides or where the petitioner transacts business which is directly affected by the action. 42 U.S.C. § 300j-7. Marathon resides within the State of Colorado, and therefore, filed its Petition for Review with the Tenth Circuit. Marathon was not entitled to file its Petition for Review in the Third Circuit, as it is not a resident within that Circuit, nor is the directly affected Marathon business activity conducted within that Circuit.

3. The Petitions for Review filed by Samson and Murphy pre-dated the Petition for Review filed by Marathon on November 20, 2001.

4. Thus, assuming that this Court finds that Marathon's Petition for Review was timely filed and that this Court therefore has jurisdiction, this proceeding must be transferred to the Third Circuit pursuant to 28 U.S.C. § 2112(a)(5).

Dated: January 25, 2002

Respectfully submitted,



John D. Fognani, Esq., Colo. Reg. # 8280
Lauren C. Buehler, Esq., Colo. Reg. # 29286
FOGNANI GUIBORD HOMSY & ROBERTS, LLP
555 – 17th Street, 26th Floor
Denver, CO 80202
Telephone: (303) 382-6200
Facsimile: (303) 382-6210

ATTORNEYS FOR MARATHON OIL COMPANY

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of January 2002, a true and correct copy of the foregoing **NOTICE OF TRANSFER PURSUANT TO 28 U.S.C. § 2112** was served via first-class mail, postage prepaid, upon the following:

Elizabeth E. Mack, Esq.
Locke Liddell & Sapp LLP
2200 Ross Avenue, Suite 2200
Dallas, TX 75201-6776

Steve Leifer, Esq.
Baker & Botts LLP
The Warner
1299 Pennsylvania Ave., N.W.
Washington, DC 20004-2400

James E. Baine, Esq.
Murphy Exploration & Production Co.
200 Peach Street
El Dorado, AK 71730

Thomas H. Chiacchio, Jr., Esq.
Blank Rome Comisky & McCauley, LLP
One Logan Square
Philadelphia, PA 19103-6998

David A. Carson, Esq.
United States Department of Justice
Environment and Natural Resources Div.
999 – 18th Street, North Tower, Suite 945
Denver, CO 80202

Jim Eppers, Esq.
U.S. Environmental Protection Agency
Region 8
999 – 18th Street, Suite 300
Denver, CO 80202-2466

Scott M. DuBoff, Esq.
Wright & Talisman, P.C.
1200 "G" Street, N.W.
Suite 600
Washington, DC 20005-3802

Barbara E. Hauk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
Office of the Clerk
Byron White United States Courthouse
Denver, Colorado 80257
(303) 844-3157

DEC 2 7 2001

Patrick J. Fisher, Jr.
Clerk of Court

Jane B. Howell
Chief Deputy Clerk

December 21, 2001

TO: ALL COUNSEL

RE: **01-9543, *Marathon Oil Co. v. EPA***

The court is considering **summary dismissal** of this appeal for lack of jurisdiction.

Within **30 days** of the above date, the parties simultaneously shall serve and file memorandum briefs in support of their respective positions on the jurisdictional issue identified below. An original and seven copies of the brief must be filed with proof of service on all other parties. *See* 10th Cir. R. 27.2(B).

The memoranda shall address the following jurisdictional issue only. The issues on appeal are not to be discussed.

> Whether this court has jurisdiction where the petition for review was filed on November 20, 2001, 46 days after the date of the order to be reviewed.?

Briefing on the merits is **TOLLED** pending further order of this court.

Very truly yours,
PATRICK FISHER, Clerk

Ellen Rich Reiter
ELLEN RICH REITER
Deputy Clerk - Jurisdictional Attorney

SHOW CAUSE ORDER

TRANSCRIPTION OF VOICEMAIL MESSAGE
FROM JIM EPPERS—EPA—REGION 8
NOVEMBER 5, 2001

Hi, Lauren,

This is Jim Eppers. I would say you've got 45 days from the amended order. To me, that's fairly obvious because the amendment was substantial. It changed the major deliverables and requirements.

So, that's my view, anyway. I haven't done the math as to when it's due, but I'm sure you will. If I can help you with anything else, give me a holler.

#15046

U.S. Department of Justice

Environment and Natural Resources Division

LJG:DAC

David A. Carson
Environmental Defense Section
999 18th Street
Suite 945 North Tower
Denver, CO 80202

Telephone (303) 312-7309
Facsimile (303) 312-7331

March 1, 2002

via federal express

Marcia M. Waldron, Clerk
21400 United States Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106-1790
Attn: Lynn Caswell Lopez

Re: Marathon Oil Co. v. EPA, No. 02-1522

Dear Ms. Lopez:

Enclosed please find the original and three copies of an Unopposed Motion to Transfer. Copies have been served in accordance with the attached Certificate of Service.

Also enclosed is my Appearance Form. Please do not hesitate to call me at (303)312-7309 if you have any questions.

Sincerely,

David A. Carson, Senior Trial Counsel
Environmental Defense Section

enclosure

cc: James Eppers
Steven Moores
Nathan Wiser
Richard Witt

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 02-1522

Marathon Oil Company vs. Unites States Environmental Protection Agency

The Clerk will enter my appearance as Counsel of Record for (please list names of all parties represented, using additional sheet(s) if needed):

United States Environmental Protection Agency

who IN THIS COURT is (please check only one):

_____ Petitioner(s) _____ Appellant(s) _____ Intervenor (s)

__X__ Respondent(s) _____ Appellee(s) _____ Amicus Curiae

(Type or Print) Name Mr. David A. Carson

Mr. Ms. Mrs. Miss

Firm United States Department of Justice, Environment and Natural Resources Division

Address Suite 945 - North Tower, 999 18th Street

City & State Denver, Colorado

Zip Code 80202

Phone (303) 312-7309

Fax (303) 312-7331

Email Address david.a.carson@usdoj.gov

SIGNATURE OF COUNSEL: _____

ONLY COUNSEL OF RECORD SHALL ENTER AN APPEARANCE AND ONLY THAT ATTORNEY WILL BE THE ONE NOTIFIED OF THE COURT'S ACTION IN THIS CASE. OTHER ATTORNEYS WHO DESIRE NOTIFICATION SHOULD MAKE APPROPRIATE ARRANGEMENTS WITH COUNSEL OF RECORD.

ONLY ATTORNEYS WHO ARE MEMBERS OF THE BAR OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT OR WHO HAVE SUBMITTED A PROPERLY COMPLETED APPLICATION FOR ADMISSION TO THIS COURT'S BAR MAY FILE AN APPEARANCE FORM. (BAR ADMISSION IS WAIVED FOR FEDERAL ATTORNEYS.)

IT IS IMPORTANT THAT ALL REQUESTED INFORMATION BE PROVIDED AND THAT COUNSEL SIGN THE FORM IN THE APPROPRIATE AREA.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Marathon Oil Company, Petitioner, v. United States Environmental Protection Agency, Respondent.	)	Case No. 02-1522

UNOPPOSED MOTION TO TRANSFER

EPA hereby respectfully moves to transfer this petition to the Tenth Circuit under 28 U.S.C. § 2112(a)(5). Petitioner Marathon Oil Company ("Marathon") does not oppose the requested transfer. The reasons supporting this motion are as follows:

1. On February 19, 2002, the Tenth Circuit transferred this petition to this Court under 28 U.S.C. § 2112. The petition challenges an EPA amended administrative order issued on October 3, 2001.

2. Also on February 19, 2002, this Court granted EPA's motion to transfer the following three petitions to the Tenth Circuit: Samson Hydrocarbons Co. v. EPA, Nos. 01-3672 and 01-4304 (consolidated) (3rd Cir.), and Murphy Exploration & Production Co. v. EPA, No. 01-3936 (3rd Cir.). Those petitions challenge the same EPA amended administrative order challenged by Marathon, as well as the previous iteration of the amended administrative order.[1]

[1] In the briefing on the motion to transfer the Samson and Murphy petitions, those petitioners argued that the Marathon petition was more limited in scope than the Samson and Murphy petitions. EPA took no position on the scope of the Marathon petition in its briefs on the motion to transfer, and it takes no position on that issue here. We only mention the fact that some

3. In granting EPA's motion to transfer the Samson and Murphy petitions to the Tenth Circuit under 28 U.S.C. § 2112(a)(5), this Court implicitly determined that those petitions should be transferred to the Tench Circuit "[f]or the convenience of the parties in the interest of justice." 28 U.S.C. § 2112(a)(5).[2/] The same logic supports a transfer of this petition back to the Tenth Circuit because it challenges the same EPA administrative order challenged in the Samson and Murphy petitions, and thus there is a risk of inconsistent judgements, and because both Marathon's counsel and EPA's counsel are located in Denver.

4. Counsel for EPA has conferred with counsel for Marathon and has been authorized to state that Marathon does not oppose a transfer of this petition back to the Tenth Circuit.

For all these reasons, the Court should transfer this petition back to the Tenth Circuit.

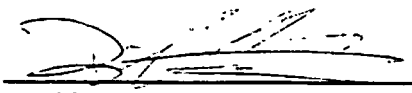
---

petitions challenge the previous iteration of EPA's amended administrative order in order to be factually accurate in our description of the various petitions.

[2/] EPA did not oppose Marathon's motion to transfer its petition to this Court because the Samson and Murphy petitions were filed prior in time to the Marathon petition, and because 28 U.S.C. § 2112(a)(5) indicates that a transfer is mandatory in such a circumstance. However, EPA also indicated that the Marathon petition should eventually be transferred back to the Tenth Circuit. Moreover, the mandatory transfer of the Marathon petition to this Court has no bearing on this Court's discretionary authority to transfer the petition back to the Tenth Circuit "[f]or the convenience of the parties in the interest of justice." See 28 U.S.C. § 2112(a)(5).

Respectfully Submitted,

THOMAS L. SANSONETTI
Assistant Attorney General
Environment & Natural Resources Division



David A. Carson
U.S. Department of Justice
Environment and Natural Resources Division
Suite 945 - North Tower, 999 18th Street
Denver, Colorado 80202
(303) 312-7309

Of Counsel:

Richard T. Witt
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Steven B. Moores
Associate Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
Denver, Colorado 80202

James Eppers
Senior Enforcement Attorney
Legal Enforcement Program
U.S. Environmental Protection Agency
Denver, Colorado 80202

Date: March 1, 2002

CERTIFICATE OF SERVICE

It is hereby certified that on this date the undersigned caused a true and correct copy of the foregoing Unopposed Motion to Transfer to be e mailed to the following counsel by first class United States mail:

John D. Fognani
Lauren C. Buehler
555 17th Street, 26th Floor
Denver, CO 80202

Scott M. DuBoff
Wright & Talisman, P.C.
1200 G. Street, N.W.
Suite 600
Washington, D.C. 20005-3802

Elizabeth E. Mack
Locke Lidell, & Sapp, L.L.C.
2200 Ross Avenue
Suite 2200
Dallas, Texas 75201-6776

Thomas H. Chiacchio, Jr.
Blank Rome Comisky & McCauley, LLP
One Logan Square
Philadelphia, Pennsylvania 19103-6998

Date: March 1, 2002

Linda Lutton

Linda Lutton

FROM: Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
999 18th Street, Suite 945
Denver, Colorado 80202

Fax No. (303) 312-7331
Voice No. (303) 312-7309

SENT BY: DAVID CARSON

TO: JIM EPPERS (303) 312-6953; STEVE MOORES (303) 312-6859; NATHAN WISER (303) 312-6409

FAX No.

NUMBER OF PAGES SENT (INCLUDING COVER PAGE):

SPECIAL INSTRUCTIONS:

1200 G Street, N.W., Suite 600
Washington, D.C. 20005-3802
(202) 393-1200
(202) 393-1240 – Telefax

Wright & Talisman, P.C.

Fax

To: David Carson **From:** Scott DuBoff

Fax: 303-312-7331 **Pages:** 12

Phone: **Date:** 01/08/02

Re: **Charge:** 709-1007

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

● Comments:

David:

The attached response was served by mail last night. Please let me know if any of the pages don't fax properly.

Scott DuBoff

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SAMSON HYDROCARBONS COMPANY, Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent	Case Nos. 01-3672 and 01-4304 (Consolidated)
MURPHY EXPLORATION & PRODUCTION COMPANY, Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent	Case No. 01-3936

JOINT RESPONSE IN OPPOSITION TO MOTIONS TO TRANSFER

Petitioners Murphy Exploration & Production Company (Murphy) and Samson Hydrocarbons Company (Samson) submit this joint response in opposition to the December 14, 2001 Motion to Transfer that Respondent United States Environmental Protection Agency (EPA) filed in each of the above-referenced proceedings on December 14, 2001. EPA's motions, which seek to transfer these proceedings from this Court to the United States Court of Appeals for the Tenth Circuit, are premature under the express terms of 28 U.S.C. § 2112(a)(5) and otherwise

unjustified. Accordingly, Murphy and Samson respectfully request that the Court deny EPA's motions.

Introduction and Background

These proceedings address two unilateral orders issued by EPA, each of which is captioned as an "Emergency Administrative Order" (EAO). The earlier of the two EAOs, issued September 20, 2001, was subsequently modified by an amended order which EPA entered on October 3, 2001 (hereinafter "the September-October 2001 EAOs"). The EAOs arise under section 1431(a) of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300i(a), and concern the East Poplar Oil Field, which is located within the Fort Peck Indian Reservation in Roosevelt County, Montana. The September-October 2001 EAOs name as respondents Murphy, Samson and two additional entities, Marathon Oil Company (Marathon) and Pioneer Natural Resources USA, Inc., each of which previously conducted petroleum production activities in the East Poplar Oil Field (Murphy continues such operations). The September-October 2001 EAOs allege an "imminent and substantial endangerment" to public health due to groundwater contamination resulting from such past oil production activities.

On September 27, 2001 Samson petitioned this Court for review of the September 20, 2001 EAO, and soon thereafter, on October 10, 2001, Samson also petitioned the Court for review of the October 3, 2001 amended EAO (Samson's two petitions, Case Nos. 01-3672 and 01-4304, have been consolidated and are referred to jointly as "Samson II"). Subsequently, on October 24, 2001, Murphy filed with the Court its own petition for review of the September-October 2001 EAOs. Then, on November 20, 2001, Marathon filed an appeal of the October 3

amended EAO with the Tenth Circuit.[1] On or about December 4, 2001 EPA filed the administrative record underlying the September-October 2001 EAOs with this Court.

Two years earlier EPA had issued other separate EAOs under SDWA section 1431(a) concerning the same facility, the East Poplar Oil Field. See EPA Docket No. SDWA-8-99-68, orders issued September 30 and November 5, 1999. One of the respondents to those orders, W. R. Grace & Company (Grace), filed an appeal with the Second Circuit, but Grace withdrew its appeal when EPA amended the 1999 orders to remove Grace as a respondent. See W. R. Grace & Co. v. U.S. Environmental Protection Agency, Case No. 99-4223 (2nd Cir., dismissed December 4, 2000). Thereafter, in November 2000, EPA added Samson as a respondent to the 1999 orders, and Samson appealed to the Tenth Circuit. See Samson Investment Co. & Samson Hydrocarbons Co. v. U.S. Environmental Protection Agency, Case No. 01-9500 ("Samson I").[2] Pursuant to an agreement reached in mediation between Samson and EPA, the Tenth Circuit, on recommendation from the Tenth Circuit Mediation Office and without consideration of the merits, has stayed Samson I until September 6, 2002. Samson anticipates that 1999 EAOs underlying that appeal will be moot by that time, which would in all likelihood moot Samson I.

---

1 See Marathon Oil Co. v. U.S. Environmental Protection Agency, Case No. 01-9543 (10th Cir.). Venue for review of SDWA orders is governed by 42 U.S.C. § 300j-7(a)(2) (venue is proper where the petitioner resides or transacts the business directly affected by the EPA order at issue). EPA acknowledges that the Murphy and Samson petitions for review are properly venued in this Circuit. See Motion, ¶ 8. Marathon was not entitled under 42 U.S.C. § 300j-7(a)(2) to file its petition for review in this Circuit initially (Marathon is not resident within the Third Circuit, nor is the directly affected Marathon business activity conducted within the Circuit).

2 EPA incorrectly suggests (Motion, ¶ 1) that the orders underlying Samson I were issued on November 30, 2000. In fact, as noted above, those orders were issued in September and November of 1999. The November 30, 2000 order to which EPA refers amended the 1999 orders to add Samson for the first time as a respondent, but did not otherwise modify the 1999 EAOs.

Although the 1999 and 2001 EPA orders that underlie these various appeals concern alleged groundwater contamination within the same geographic area, the administrative records underlying the respective appeals of the 1999 and 2001 orders are different and the orders are separate and distinct in a number of other ways as well. As an example, the 1999 orders at issue in Samson I require the EAO respondents to supply a small quantity of drinking water (one gallon per person per day) to twenty residences and provide certain records regarding the EAO respondents' facilities in the East Poplar field. The 2001 orders, on the other hand, require a five-year study of an alleged groundwater contaminant plume's migration pathway toward the City of Poplar and construction of a pipeline capable of delivering on a daily basis at least 10,000 gallons of potable water to designated home sites on the Fort Peck Reservation.

Discussion

A. 28 U.S.C. § 2112(A)(5) Precludes Consideration Of EPA's Motion At This Time

The Court's consideration of EPA's motion is governed by section 2112(a)(5) of the Judicial Code. The statute provides as follows:

> All courts in which proceedings are instituted with respect to the same order, other than the court in which the record is filed pursuant to this subsection, shall transfer those proceedings to the court in which the record is so filed. For the convenience of the parties in the interest of justice, the court in which the record is filed may thereafter transfer all the proceedings with respect to that order to any other court of appeals.

28 U.S.C. § 2112(a)(5) (emphasis added). As noted above, the record on review was filed with this Court on or about December 4, 2001. As a result, section 2112(a)(5) mandates that the Tenth Circuit transfer Marathon's petition to this Court (it appears that EPA has not as of this time advised the Tenth Circuit that the record concerning the September-October 2001 EAOs was filed with this Court). Nevertheless, by its own terms section 2112(a)(5) precludes the

transfer that EPA seeks on grounds of convenience until after Marathon's petition is transferred to this Court. EPA's contrary suggestion (Motion, ¶ 9), i.e., this Court "may transfer" the pending Murphy and Samson petitions at this time, plainly contradicts section 2112(a)(5).

B. EPA's Motion Is Otherwise Unjustified And Contradicts A Fundamental Principle Guiding Implementation Of Section 2112(a)(5) -- Respecting A Petitioner's Choice of Forum

1. Convenience Does Not Favor Transfer To The Tenth Circuit

EPA argues that the Tenth Circuit is a more convenient forum because Marathon's petition was filed there and the geographic proximity of certain counsel. EPA's position is incorrect.

First, EPA's repeated reliance (Motion, ¶¶ 7, 10 and 11) on the pendency of the Marathon petition in the Tenth Circuit is invalid on several bases. Thus, as noted above, the Marathon petition is required by law to be transferred to this Court, that is, the circuit in which the record has been filed, regardless of any EPA motion -- or intention -- regarding a possible subsequent transfer.

Moreover, of far more importance for present purposes are several key facts concerning the timing and scope of Marathon's petition. In that regard it should be noted that the Tenth Circuit is at this time considering on its own initiative summary dismissal of Marathon's appeal of the October 3 order as untimely and has recently issued an order for briefing. See attached December 21, 2001 notice issued by the Tenth Circuit. If the Tenth Circuit dismisses Marathon's petition as untimely, that petition will obviously not be a factor in this Court's evaluation of EPA's transfer motions.

Alternatively, assuming that Marathon filed a timely appeal, that appeal would be limited to seeking review of EPA's October 3, 2001 amended EAO. That is because unlike the Murphy and Samson petitions before this Court for review of both the September 20, 2001 EAO as well

as the October 3 amendment, Marathon's November 20, 2001 petition is limited to seeking review of the October 3 amendment only. As a result, the Marathon petition is limited to matters that arise by virtue of the amended order and will not extend to (or incorporate retroactively) grounds for appeal that would arise from the September 20, 2001 EAO. See 42 U.S.C. § 300j-7(a) (an appeal filed after the 45-day period for review of the September 2001 order is allowed if "based solely on grounds arising after the expiration of such period"). The October 3 amended order merely extended certain deadlines -- at the request of the EAO respondents -- and removed Samson Investment Company, Samson's parent corporation, as a named respondent. Accordingly, assuming that Marathon's appeal of the October 3 amended order was timely, the appeal will be limited to the very narrow matters noted above. To allow such a limited appeal to take precedence over the far more expansive appeals of Murphy and Samson would be entirely unjustified.

Finally, EPA's emphasis on the geographic location of the parties' counsel distorts section 2112(a)(5)'s reference to "convenience of the parties" far beyond what Congress intended. In point of fact, administrative review proceedings before the various circuits of the court of appeals are quite different from federal district court litigation because "review on an agency record is reasonably portable." See 16 Wright & Miller, Federal Practice and Procedure § 3944 at 843 (1996). The Wright & Miller treatise further explains this point as follows (emphasis added):

> The fundamental burdens that arise from the place of pretrial and trial proceedings in district court have few parallels in administrative review proceedings. Review on an agency record is reasonably portable. The greatest inconveniences will be familiarization with the local rules of the circuit and -- if oral argument is had -- transportation to the place of argument. These same considerations, however, also suggest that there will seldom be much need for transfer. If the review statute allows a wide

choice of forums, the courts of appeals should honor the resulting freedom to choose.

Simply put, there is little in the way of inconvenience that a party will sustain due to the choice of one venue over another in proceedings for review of federal administrative agency orders.[3] For that reason, "[t]he interest of justice favors retention of jurisdiction in the forum chosen by an aggrieved party where, as here, Congress has given him a choice." Newsweek, Inc. v. U.S. Postal Serv., 652 F.2d 239, 243 (2nd Cir. 1981); see also Tenneco Oil Co. v. Environmental Protection Agency, 592 F.2d 897, 900 (5th Cir. 1979), citing Wright & Miller, supra, § 3944 ("As a general rule, in the absence of unusual circumstances compelling transfer courts have not exercised their inherent power to transfer to disturb a party's choice of forum"). The SDWA's judicial review provision, 42 U.S.C. § 300j-7(a)(2), provides Murphy and Samson with a choice of forums, and they selected this Court. Their choice should be honored.

2. Judicial Economy Will Not Be Advanced By Transfer To The Tenth Circuit

EPA also argues (Motion, ¶ 11) that "judicial economy favors" transfer of the Murphy and Samson II petitions to the Tenth Circuit because Samson I is already pending in that court. EPA's position is again incorrect.

First, the Tenth Circuit, that is, the judges on that court, have not devoted any substantive attention to Samson I. Instead the case has been in mediation with all briefing stayed. As EPA suggests (Motion, n.1), mediation has resulted in the case being stayed until September 6, 2002, at which time the parties anticipate that the orders at issue in Samson I will be moot and that case

[3] While Murphy and Samson acknowledge that the Tenth Circuit would be more convenient for EPA counsel, for other counsel the Third Circuit, in comparison to the Tenth Circuit, is either more convenient (e.g., Murphy's counsel in Washington, D.C.) or at least equally convenient (e.g., Murphy's Office of General Counsel in El Dorado, Arkansas and Samson's counsel in Dallas, Texas).

will be resolved without there having been any need for consideration of the merits by the Tenth Circuit. In the unlikely event that the issues are not mooted by September 2002, or the parties do not otherwise agree to an additional stay, Samson has already indicated that it would seek to transfer Samson I to this Court. See Case No. 01-3672, Concise Statement of Facts and Issues, Samson Hydrocarbons Co., October 29, 2001, n.1. Samson has deferred filing that motion in view of the Tenth Circuit's stay. In short, the likelihood that two circuits would consider on the merits separate appeals challenging the 1999 and 2001 EAOs is minimal, if not non-existent.[4]

Conclusion

In summary, Murphy and Samson submit that EPA's motion to transfer is premature and should be dismissed on that basis. Independent of its lack of ripeness, EPA's motion is also unjustified on the merits. Review proceedings before this Court concerning the subject petitions for review will not cause duplication of effort by the parties, inefficiency for the courts or conflicting outcomes. On the other hand, this Court's retention of jurisdiction will properly respect the petitioners' choice of forum, consistent with the policies underlying 28 U.S.C. §

---

[4] Putting aside the extreme unlikelihood of that outcome, the notion of two circuits considering a similar subject matter and reaching different conclusions is not a negative. A Senior Judge of the Ninth Circuit addressed this precise point as follows:

> When circuits differ, they provide the reasoned alternatives from which the resolver of the conflict can derive a more informed analysis. The many circuit courts act as the "laboratories" of new or refined legal principles (much as the state courts may do in our federal system), providing the Supreme Court with a wide array of approaches to legal issues and thus, hopefully, with the raw material from which to fashion better judgments.

J. Clifford Wallace, "The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill," 71 Calif. L. Rev. 913 (1983).

2112(a)(5). In view of these matters, Murphy and Samson respectfully request that the Court deny the December 14, 2001 Motions to Transfer that EPA has filed in these proceedings.

Respectfully submitted,

Scott M. DuBoff
WRIGHT & TALISMAN, P.C.
1200 G Street NW, Suite 600
Washington, DC 20005-3802
(202) 393-1200

Counsel for Petitioner
Murphy Exploration & Production Company

Elizabeth E. Mack
LOCKE LIDDELL & SAPP LLP
2200 Ross Avenue, Suite 2200
Dallas, TX 75201-6776
(214) 740-8000

Counsel for Petitioner
Samson Hydrocarbons Company

Dated: January 7, 2002

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
Office of the Clerk
Byron White United States Courthouse
Denver, Colorado 80257
(303) 844-3157

Patrick J. Fisher, Jr.
Clerk of Court

Jane B. Howell
Chief Deputy Clerk

December 21, 2001

TO: ALL COUNSEL

RE: **01-9543, *Marathon Oil Co. v. EPA***

The court is considering summary dismissal of this appeal for lack of jurisdiction.

Within 30 days of the above date, the parties simultaneously shall serve and file memorandum briefs in support of their respective positions on the jurisdictional issue identified below. An original and seven copies of the brief must be filed with proof of service on all other parties. *See* 10th Cir. R. 27.2(B).

The memoranda shall address the following jurisdictional issue only. The issues on appeal are not to be discussed.

> Whether this court has jurisdiction where the petition for review was filed on November 20, 2001, 46 days after the date of the order to be reviewed.?

Briefing on the merits is TOLLED pending further order of this court.

Very truly yours,
PATRICK FISHER, Clerk

ELLEN RICH REITER
Deputy Clerk - Jurisdictional Attorney

SHOW CAUSE ORDER

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SAMSON HYDROCARBONS COMPANY, et al, Petitioners. v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY. Respondent	Case Nos. 01-3936, 01-3672 and 01-4304

CERTIFICATE OF SERVICE

I hereby certify that I have this 7th day of January 2002 caused copies of the foregoing Joint Response in Opposition to Motions to Transfer to be served upon each of the persons listed below by delivering copies thereof to the U.S. Postal Service with postage prepaid and addressed as follows:

James Eppers
U.S. Environmental Protection Agency
Region 8 - 8ENF-T
999 18th Street, Suite 300
Denver, CO 80202-2466

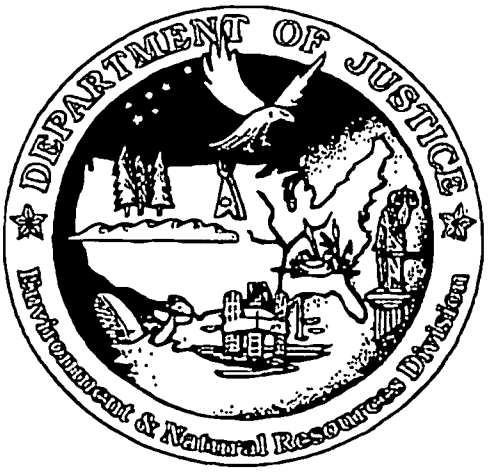
David A. Carson
United States Department of Justice
999 18th Street, Suite 945 North Tower
Denver, CO 80202

Candace J. Walker
Marathon Oil Company
5555 San Felipe
Houston, TX 77210-4813

Steve Leifer
Baker Botts LLP
The Warner
1299 Pennsylvania Avenue NW
Washington, DC 20004-2400

John D. Fognani
Fognani Guibord Hornsy & Roberts, LLP
555 – 17th Street, 26th Floor
Denver, CO 80202

Scott M. DuBoff



FROM: Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
999 18th Street, Suite 945
Denver, Colorado 80202

Fax No. (303) 312-7331
Voice No. (303) 312-7309

SENT BY: **DAVID CARSON**

TO: STEVEN MOORES (303) 312-6859; NATHAN WISER (303) 312-6409; JIM EPPERS (303) 312-6953; RICHARD WITT (202) 564-5477

FAX No.

NUMBER OF PAGES SENT (INCLUDING COVER PAGE):

SPECIAL INSTRUCTIONS:

1200 G Street, N.W., Suite 600
Washington, D.C. 20005-3802
(202) 393-1200
(202) 393-1240 – Telefax

Wright & Talisman, P.C.

Fax

To: David Carson **From:** Scott DuBoff

Fax: 303-312-7331 **Page:** 10

Phone: **Date:** 01/22/02

Re: **Charge:** 709-1007

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

● Comments:

David:

Please see attached documents, which were served yesterday by U.S. Mail.

Scott DuBoff

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SAMSON HYDROCARBONS COMPANY, Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent	Case Nos. 01-3672 and 01-4304 (Consolidated)
MURPHY EXPLORATION & PRODUCTION COMPANY, Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent	Case No. 01-3936

JOINT MOTION FOR LEAVE TO FILE SURREPLY IN OPPOSITION TO MOTIONS TO TRANSFER

Petitioners Murphy Exploration & Production Company (Murphy) and Samson Hydrocarbons Company (Samson) submit this joint motion for leave to file the accompanying surreply in response to the January 14, 2002 reply memorandum filed in these proceedings by Respondent United States Environmental Protection Agency (EPA). The Murphy and Samson petitions concern a unilateral order -- an Emergency Administrative Order (EAO) -- which EPA issued pursuant to section 1431 of the Safe Drinking Water Act, 42 U.S.C. § 300i, on September 20, 2001, and which EPA subsequently modified in very limited respects in an October 3, 2001

amended order. A petition filed with the Tenth Circuit subsequent to the Murphy and Samson petitions, Marathon Oil Co. v. U.S. Environmental Protection Agency, Case No. 01-9543, seeks review of one of the same orders, the October 3 amended EAO.

The proposed surreply is made necessary due to the discussion in EPA's January 14 reply memorandum (e.g., p. 4) regarding the pending Tenth Circuit Marathon proceeding, on which EPA relies as a significant factor justifying its motions for transfer of the Murphy and Samson petitions to that Court. In that regard, EPA's January 14 reply memorandum fails to apprise this Court of essential facts concerning the Tenth Circuit case. Specifically, as Murphy and Samson explain in their surreply, the petition in Marathon is jurisdictionally deficient and will not support a viable appeal. Indeed, EPA's reply concedes, as it must, that "it is likely that the scope of Marathon's petition will have to be determined when the parties brief the merits of that petition." Reply, p. 4. Nevertheless, EPA suggests, quite incorrectly in the view of Murphy and Samson, that the Marathon petition's jurisdictional infirmity is not germane to EPA's present motions seeking transfer of the Murphy and Samson petitions to the Tenth Circuit.

The accompanying surreply is limited to addressing this one matter, and Murphy and Samson believe that the surreply will assist the Court's consideration of the pending Motions to Transfer. In that regard, the surreply is very brief (less than two pages of text), does not reargue matters that have been previously addressed, and is offered in the interest of proper disposition of the pending motions. Finally, the surreply is not interposed for delay -- it is being filed with the Court very promptly following receipt of EPA's January 14 reply memorandum.

In view of these matters, Murphy and Samson respectfully request leave to file the accompanying surreply in opposition to EPA's December 14, 2001 Motions to Transfer these proceedings.

Respectfully submitted,

Scott M. DuBoff
WRIGHT & TALISMAN, P.C.
1200 G Street NW, Suite 600
Washington, DC 20005-3802
(202) 393-1200

Counsel for Petitioner
Murphy Exploration & Production Company

Elizabeth E. Mack
LOCKE LIDDELL & SAPP LLP
2200 Ross Avenue, Suite 2200
Dallas, TX 75201-6776
(214) 740-8000

Counsel for Petitioner
Samson Hydrocarbons Company

Dated: January 21, 2002

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SAMSON HYDROCARBONS COMPANY, Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent	Case Nos. 01-3672 and 01-4304 (Consolidated)
MURPHY EXPLORATION & PRODUCTION COMPANY, Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent	Case No. 01-3936

SURREPLY IN OPPOSITION TO MOTIONS TO TRANSFER

Petitioners Murphy Exploration & Production Company (Murphy) and Samson Hydrocarbons Company (Samson) jointly submit this surreply in response to the January 14, 2002 reply memorandum filed in these proceedings by Respondent United States Environmental Protection Agency (EPA). EPA's reply memorandum takes an untenable position: on the one hand, EPA asks this Court to assume, for purposes of EPA's pending Motions to Transfer, that a related appeal by Marathon Oil Company (Marathon) before the Tenth Circuit is jurisdictionally viable;[1] on the other hand, EPA reserves the right to argue later that the very same Marathon

[1] Marathon Oil Co. v. U.S. Environmental Protection Agency, Case No. 01-9543.

petition is jurisdictionally defective under the judicial review provision of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-7(a). EPA's own words say it all: "it is likely that the scope of Marathon's petition will have to be determined when the parties brief the merits of that petition," but EPA "takes no position at this time." Reply, p. 4 (emphasis added). The only reason why such a determination is "likely," as EPA suggests, is because EPA anticipates raising the issue; obviously Marathon will not do so, and Murphy and Samson are not parties to the Marathon case and have no interest whatsoever in the matter except as it relates to EPA's Motions to Transfer.

Despite EPA's coyness ("tak[ing] no position at this time"), the disabling jurisdictional defect underlying Marathon's petition is already well known to EPA. In that regard, Marathon's petition is limited to review of the Emergency Administrative Order (EAO) amendment that EPA issued on October 3, 2001 pursuant to SDWA section 1431, 42 U.S.C. § 300i. The SDWA's judicial review provision restricts Marathon's petition to matters that arise from the October 3 order and expressly precludes review of matters arising from the underlying September 20 order (in contrast to the Marathon petition, the Murphy and Samson petitions encompass both orders). See 42 U.S.C. § 300j-7(a) (an appeal filed after the 45-day period for review of the September 20 order is allowed if "based solely on grounds arising after the expiration of such period"). But the October 3 order simply extended certain deadlines (at the request of Marathon and the other EAO respondents) and removed Samson's parent corporation, Samson Investment Company, as a respondent. Neither of those matters causes aggrievement, and neither provides standing to support an appeal.[2]

---

[2] In fact, neither of these matters is in the list of issues on appeal that Marathon provides in its Tenth Circuit Docketing Statement. Instead, each of the issues Marathon lists arise from the September 20 EAO. See attached Appendix.

Murphy and Samson recognize it is none of their concern, as a general matter, that EPA would choose to ignore a jurisdictional infirmity in a petition for review in another proceeding before a different court. But that obviously changes where, as in this case, EPA relies on such a petition as a principal basis for its Motions to Transfer. EPA cannot have it both ways -- knowing full well that the Marathon's Tenth Circuit petition is jurisdictionally defective, EPA cannot rely on that petition as jurisdictionally viable in order to advance its desire to have these cases transferred. Simply put, it stands logic on its head to suggest that this Court should rely on a jurisdictionally infirm petition before the Tenth Circuit as justification for transferring the Murphy and Samson petitions to that court.

In view of these matters, Murphy and Samson respectfully request that the Court deny the December 14, 2001 Motions to Transfer that EPA has filed in these proceedings.

Respectfully submitted,

Scott M. DuBoff
WRIGHT & TALISMAN, P.C.
1200 G Street NW, Suite 600
Washington, DC 20005-3802
(202) 393-1200

Counsel for Petitioner
Murphy Exploration & Production Company

Elizabeth E. Mack
LOCKE LIDDELL & SAPP LLP
2200 Ross Avenue, Suite 2200
Dallas, TX 75201-6776
(214) 740-8000

Counsel for Petitioner
Samson Hydrocarbons Company

Dated: January 21, 2002

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DOCKETING STATEMENT

Case Name: **Marathon Oil Company v. United States Environmental Protection Agency**

Court/Agency Appeal From: **United States Environmental Protection Agency**

Court/Agency Docket No.: **SDWA-08-2001-33**

Party or Parties filing Notice of Appeal/Petition: **Marathon Oil Company**

* * *

IV. ISSUES RAISED ON APPEAL.

Marathon Oil Company expects to raise the following issues, among others, on appeal:

1. Whether EPA exceeded its authority under the Safe Drinking Water Act ("SDWA") by issuing the EAO.

2. Whether the administrative record supports EPA's assertion that the limited activities of Marathon Oil Company's predecessor, TXO, caused or contributed to an imminent and substantial endangerment to human health. Specifically, Marathon will question whether the following activities caused or contributed to an imminent and substantial endangerment, as alleged by EPA:

a. The seismic survey conducted by TXO;
b. Construction activities associated with SWD#1;
c. Alleged leaks in some produced water pipelines; and
d. A spill of 200 barrels of oil, 190 of which were recovered.

3. Whether EPA erred in determining that the requirements of the EAO were necessary to abate any alleged imminent and substantial endangerment to human health.

4. Whether EPA erred in ordering Marathon Oil Company to perform the requirements of the EAO in the absence of record evidence that TXO's operations caused or contributed to any alleged imminent and substantial endangerment to human health.

5. Whether EPA failed to meet its statutory duty under Section 1431 of the SDWA because it did not have information indicating that the applicable state and local authorities failed to act to protect human health.

6. Whether EPA erred in issuing the EAO when there is no evidence whatsoever that TXO's actions impacted a public water system or underground source of drinking water.

7. Whether the EAO is barred and/or preempted by the action in *Youpee et. al. v. Murphy Exploration & Production, Co.*, No. CV-98-108-BLG-JDS (D. Mont.).

8. Whether the EAO is arbitrary and capricious, an abuse of discretion or otherwise not in accordance with law.

Marathon reserves the right to raise additional issues in its appeal.

* * *

* * *

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SAMSON HYDROCARBONS COMPANY, et al, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent	Case Nos. 01-3936, 01-3672 and 01-4304

CERTIFICATE OF SERVICE

I hereby certify that I have this 21st day of January 2002 caused copies of the foregoing Joint Motion for Leave to File Surreply in Opposition to Motions to Transfer, together with the accompanying surreply, to be served upon each of the persons listed below by delivering copies thereof to the U.S. Postal Service with postage prepaid and addressed as follows:

James Eppers
U.S. Environmental Protection Agency
Region 8 - 8ENF-T
999 18th Street, Suite 300
Denver, CO 80202-2466

David A. Carson
United States Department of Justice
999 18th Street, Suite 945 North Tower
Denver, CO 80202

Candace J. Walker
Marathon Oil Company
5555 San Felipe
Houston, TX 77210-4813

Steve Leifer
Baker Botts LLP
The Warner
1299 Pennsylvania Avenue NW
Washington, DC 20004-2400

John D. Pognani
Pognani Guibord Hornsy & Roberts, LLP
555 – 17th Street, 26th Floor
Denver, CO 80202

Scott M. DuBoff

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Marathon Oil Company,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 01-9543
	)	
United States Environmental Protection Agency,	)	
	)	
Respondent.	)	
	)	

EPA'S MEMORANDUM ON JURISDICTION

INTRODUCTION

By letter dated December 21, 2001, the Court directed the parties to file memorandum briefs addressing the following jurisdictional issue:

> Whether this court has jurisdiction where the petition for review was filed on November 20, 2001, 46 days after the date of the order to be reviewed.

The Court specifically directed that the parties' memoranda should address the above-stated issue only. For the reasons stated below, Respondent United States Environmental Protection Agency ("EPA") believes the petition was timely filed and that the Court has jurisdiction to consider the petition for review.

BACKGROUND

A. Factual and Procedural Background.

On September 20, 2001, EPA issued an Emergency Administrative Order under the authority of section 1431 of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §300i, to the

Marathon Oil Company ("Marathon") and several other petroleum companies who are operating or have operated in the East Poplar Oil Field, located on the Fort Peck Indian Reservation, in northern Montana. The Companies expressed concern over certain deadlines in the September 20, 2001 order, and EPA amended and re-issued its order on October 3, 2001.[1]

Petitioner Marathon Oil Company ("Marathon") filed a petition in this Court on November 20, 2001, seeking review of EPA's October 3, 2001, Amended Order.[2]

B. Statutory and Regulatory Background.

Judicial review of EPA orders under the SDWA is governed by section 1448 of the Act, 42 U.S.C. §300j-7(a), which provides, in pertinent part, as follows:

> A petition for review of
>
> . . .
>
> (2) any other final action of the Administrator under this chapter may be filed in the circuit in which the

---

[1] The order requires the Companies to deliver adequate drinking water for a minimum of five years to replace contaminated ground water serving certain reservation home sites. It also requires the Companies to identify and monitor a contamination plume and assess any threat to public water supplies of the City of Poplar. The Companies are also required to provide EPA with records of ground water monitoring and other activities.

[2] Two other companies, Samson Hydrocarbons Company and Murphy Exploration and Production Company, have challenged EPA's September 20, 2001, Order and its October 3, 2001 Amended Order in the United States Court of Appeals for the Third Circuit. Samson Hydrocarbons Co. v. EPA, Nos. 01-3672 and 01-4304 (3rd Cir.) (consolidated); Murphy Exploration & Production Company v. EPA, No. 01-3936 (3rd Cir.). In addition, Samson Hydrocarbons Company and Samson Investment Company have challenged a previous and related EPA SDWA administrative order concerning the groundwater contamination on the Fort Peck Reservation in this Court. Samson Hydrocarbons Co. v. EPA, No. 01-9500 (10th Cir.). That case has been in this Court's mediation program since it was filed, and by order dated December 14, 2001, the case is held in abeyance until September 6, 2002. EPA has moved to transfer the Third Circuit petitions to this Court. Petitioners in those cases have opposed the motion to transfer, which has not yet been ruled upon by the Third Circuit.

> petitioner resides or transacts business which is directly affected by the action.
>
> Any such petition shall be filed within the 45-day period beginning on the date of . . . [the] final Agency action with respect to which review is sought or on the date of the determination with respect to which review is sought, and may be filed after the expiration of such 45-day period if the petition is based solely on grounds arising after the expiration of such period.

42 U.S.C. 300j-7(a)(2).

EPA has promulgated regulations concerning the timing of its actions for purposes of judicial review under 42 U.S.C. § 300j-7(a)(2). Those regulations are codified at 40 C.F.R. § 23.7. EPA's regulations provide, in pertinent part, as follows:

> Unless the Administrator otherwise explicitly provides in a particular promulgation action or determination, the time and date of the Administrator's promulgation, issuance, or determination for purposes of section 1448(a)(2) shall be at 1:00 p.m eastern time (standard or daylight, as appropriate), on the date that is . . . for any . . . document, two weeks after it is signed.

40 C.F.R. § 23.7. Therefore, under EPA's regulation as it relates to administrative orders reviewable under 42 U.S.C. § 300j-7(a)(2), the date of final Agency action for purposes of judicial review is at 1:00 p.m. eastern time, two weeks after the date an order is signed, unless the order explicitly provides to the contrary.

ARGUMENT

Marathon's Petition Challenging EPA's October 3, 2001, Administrative Order Was Timely Filed Under EPA's Regulations.

As this Court has held, the time limit for filing a petition for review under 42 U.S.C. §

300j-7(a) is jurisdictional in nature. HRI, Inc. v. EPA, 198 F.3d 1224, 1235 (10th Cir. 2000).[3] More recently, the District of Columbia Circuit construed a substantially similar provision in the Clean Water Act and held that Rule 26(a) of the Federal Rules of Appellate Procedure does not apply "when Congress has specified a particular method of counting in the statute itself and there is no indication of a contrary congressional intention." Slinger Drainage, Inc. v. EPA, 237 F.3d 681, 683 (D.C.Cir.), cert. denied, 122 S.Ct. 394 (2001). Thus, where as here, Congress has specifically provided that a petition must be filed "within the 45-day period beginning on the date of . . . [the] final Agency action with respect to which review is sought" the 45-day period begins to run on the date of the final agency action, and not on the next day as it would under Rule 26(a) of the Federal Rules of Appellate Procedure. See id.

This does not mean that EPA cannot, as it has done here, promulgate a regulation that defines when its actions become final agency actions for purposes of judicial review. EPA has not changed the method of accounting specified by Congress, rather it has only exercised its discretion to define when its own actions become final agency actions. Thus, EPA's regulations are consistent with the SDWA's judicial review provision. EPA promulgated its regulations in an attempt to prevent the race to the courthouse that often occurs when EPA takes an action affecting more than one party and where original jurisdiction to review the action may potentially lie in more than one court of appeals. See 50 Fed. Reg. 7,268 (Feb. 21, 1985) (final rule); 49 Fed. Reg. 23,152 (Jun. 4, 1984) (proposed rule). In its proposed rule, EPA explained that races to the courthouse often involve elaborate schemes to be the first to file and waste EPA's resources in

---

[3] EPA's regulations at 40 C.F.R. § 23.7 were not at issue in that case and were not construed by the Court.

responding to the racers' continual requests for information on the status of pending actions. 49 Fed. Reg. at 23,152-53. EPA further explained its belief that races to the courthouse are unfair to litigants with less financial resources, and that they are also undignified parodies of the legal process with which EPA does not wish to be associated. Id. at 23,153. Based upon similar sentiments, the District of Columbia Circuit long ago encouraged federal agencies to promulgate regulations that discourage such races:

> If the federal administrative agencies would promulgate straightforward regulations explaining how and when their reviewable orders are to issue, protracted procedural disputes born of the desire to win the race to the courthouse would largely be consigned to an early grave.

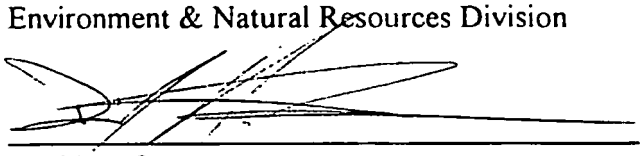
International Union of Electrical, Radio and Machine Workers v. NLRB, 610 F.2d 956, 964 (D.C. Cir. 1979). Therefore, EPA's regulations are not only consistent with the SDWA's judicial review provision, they also serve the legitimate purpose of diminishing the prospect of a race to the courthouse by defining when EPA's actions become final for purposes of judicial review in a manner that seeks to place all affected parties on equal footing.

Reading EPA's regulations at 40 C.F.R. § 23.7 together with the court's decision in Slinger Drainage, the 45-day period for seeking review of a SDWA administrative order such as the one at issue here, begins precisely at 1:00 p.m. eastern time, two weeks after the date the order was signed, unless the order explicitly provides to the contrary. In this case, EPA's Amended Order was signed on October 3, 2001, and it did not explicitly provide that it would be considered a final agency action at any time other than two weeks later as provided for in EPA's

regulations.[4] Thus, under EPA's regulation, the Amended Order became a final agency action for purposes of judicial review on October 17, 2001. Marathon would have had until November 30, 2001, within which to file its petition under 42 U.S.C. § 300j-7(a)(2). Marathon filed its petition on November 20, 2001. Therefore, Marathon's petition challenging EPA's October 30, 2001 Amended Order was timely filed, and this Court has jurisdiction over the petition.[5]

Respectfully Submitted,

THOMAS L. SANSONETTI
Assistant Attorney General
Environment & Natural Resources Division



David A. Carson
U.S. Department of Justice
Environment and Natural Resources Division
Suite 945 - North Tower, 999 18th Street
Denver, Colorado 80202
(303) 312-7309

Of Counsel:

Richard Witt
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

---

[4] The order, by its own terms, became effective for the purpose of computing time for compliance with certain of the order's requirements, three working days later, on October 9, 2001. However, the compliance deadlines are different than, and irrelevant to, the 45-day window for seeking judicial review of the order.

[5] Because the Court explicitly limited the question to be addressed in this memorandum to whether the Court has jurisdiction to hear Marathon's challenge to EPA's October 3, 2001, Amended Order, we do not here address any issues relating to the scope or merits of Marathon's petition.

Steven B. Moores
Associate Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
Denver, Colorado 80202

James Eppers
Senior Enforcement Attorney
Legal Enforcement Program
U.S. Environmental Protection Agency
Denver, Colorado 80202

Date: January 22, 2002

CERTIFICATE OF SERVICE

It is hereby certified that on this date the undersigned caused a true and correct copy of the foregoing EPA's Memorandum on Jurisdiction to be mailed to the following counsel of record by first class United States mail:

John D. Fognani
Lauren C. Buehler
555 17th Street, 26th Floor
Denver, CO 80202

With courtesy copies to the following:

Scott M. DuBoff
Wright & Talisman, P.C.
1200 G. Street, N.W.
Suite 600
Washington, D.C. 20005-3802

Elizabeth E. Mack
Locke Lidell, & Sapp, L.L.C.
2200 Ross Avenue
Suite 2200
Dallas, Texas 75201-6776

Thomas H. Chiacchio, Jr.
Blank Rome Comisky & McCauley, LLP
One Logan Square
Philadelphia, Pennsylvania 19103-6998

Date: January 22, 2002

Linda Lutton